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Private Religious Choice in German and American Constitutional Law: Government Funding and Government Religious Speech

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I. INTRODUCTION

Sweeping demographic changes have dramatically increased religious heterogeneity in the Federal Republic of Germany since the approval of its constitution (Basic Law) by the Parliamentary Council and the Allied Powers in 1949.¹ Due to Muslim immigration largely from Turkey,² immigration by members of

1. The Parliamentary Council intended the Basic Law to be temporary because the division of Germany excluded many from participating in its drafting and ratification. See KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND [ESSENTIALS OF THE CONSTITUTIONAL LAW OF THE FEDERAL REPUBLIC OF GERMANY] 34-35 (20th ed. 1995). To ensure the document would not entrench this division, the drafters avoided the term "constitution" in favor of "Grundgesetz" or "Basic Law." See *id.* Since the unification of the two German countries and in light of the lasting meaning and importance of the Basic Law, it is fair to characterize the Basic Law as a constitution. See *id.* The terms are used interchangeably in this Article.

2. The Islamic Council in Germany estimated the number of Muslims at 2.3 million in 1994, and a 1997 estimate placed the number of *Turkish* Muslims at over 2 million, out of a total population in Germany of around 82 million. See Stefan Mückel, *Streit um den muslimischen Gebetsruf* [Dispute over the Muslim Call to Prayer], 12 NORDRHEIN-WESTFÄLISCHE VERWALTUNGSBLÄTTER 1 (1998). Very reliable data is available for the number of Turkish citizens living in Germany. In 1961, 6700 Turkish citizens lived in Germany (West). By 1987, the number had risen to 1,422,700. See STATISTISCHES BUNDESAMT, STATISTISCHES JAHRBUCH 1995 FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [STATISTICAL YEARBOOK 1995 FOR THE FEDERAL REPUBLIC OF GERMANY] 67 (1995) [hereinafter publications in this series are identified as STATISTICAL YEARBOOK with the applicable year]. At the end of December 1997, the number of Turkish citizens stood at 2,107,426 in Germany

other minority religious groups,³ reunification with a dramatically secularized East Germany,⁴ and declining religious affiliation in the western German states,⁵ Germany has proportionally far fewer people affiliated with the Protestant⁶ and Catholic churches

as a whole. See BEAUFTRAGTE DER BUNDESREGIERUNG FÜR AUSLÄNDERFRAGEN, DATEN UND FAKTEN ZUR AUSLÄNDERSITUATION [DATA AND FACTS ON THE SITUATION OF FOREIGNERS] 21 (1998). Most members of Islam are Turkish, but the last federal census took place in 1987 and no more recent data about the number of Muslims or their breakdown by nationality is available from the federal government. The 1987 census counted 1,650,952 members of Islam, including about 48,000 Germans (some of Turkish descent), about 1,325,000 Turkish citizens, and about 75,000 citizens of Yugoslavia. See STATISTICAL YEARBOOK 1993, *supra*, at 68. Immigration from the former Yugoslavian states during the past ten years has probably increased their share in the total Muslim population. See *id.*

3. Citizens of other countries, or immigrants that now have German citizenship, contribute significantly to the Greek, Syrian, and Serbian orthodox churches. See BUNDESZENTRAL FÜR POLITISCHE BILDUNG, REPORT BY THE FEDERAL GOVERNMENT'S COMMISSIONER FOR FOREIGNERS' AFFAIRS ON THE SITUATION OF FOREIGNERS IN THE FEDERAL REPUBLIC OF GERMANY IN 1993 48-49 (1994). Immigration is also adding to the Jewish population, which remained relatively constant at about 27,000 during the 1970s and 1980s, see STATISTICAL YEARBOOK 1993, *supra* note 2, at 107, but has grown from 33,692 in 1991 to 61,203 in 1996, STATISTICAL YEARBOOK 1997, *supra* note 2, at 99, primarily due to immigration from eastern Europe. Immigration has also contributed significantly to the number of Catholics in Germany. See BEAUFTRAGTE DER BUNDESREGIERUNG FÜR AUSLÄNDERFRAGEN, BERICHT DER BEAUFTRAGTEN DER BUNDESREGIERUNG FÜR AUSLÄNDERFRAGEN ÜBER DIE LAGE DER AUSLÄNDER IN DER BUNDESREPUBLIK DEUTSCHLAND [REPORT BY THE FEDERAL GOVERNMENT'S COMMISSIONER FOR FOREIGNERS' AFFAIRS ON THE SITUATION OF FOREIGNERS IN THE FEDERAL REPUBLIC OF GERMANY] 81-82 (1997). About 40,000 Buddhists live in Germany, as do about 90,000 immigrants from primarily Hindu countries, including Sikhs. See *id.*

4. The official name for East Germany was the German Democratic Republic. In 1990 the states of East Germany, through the action of the central East German government, adopted the Basic Law and became states of the Federal Republic of Germany. See Peter E. Quint, *The Constitutional Law of German Unification*, 50 MD. L. REV. 475, 476-77, 526-27, 531 (1991).

5. Between 1970 and 1989 the total number of Protestants belonging to the main Protestant church, as defined *infra* at note 6, dropped from 28.3 million to 25.1 million, while the total number of Catholics fell from 27.2 to 26.7 million. See "Liebster Jesu, wir sind vier . . .," ["Dearest Jesus, we are four . . ."] DER SPIEGEL, no. 52, 1997, at 58, 59 [hereinafter *Dearest Jesus*].

6. The Protestant Church (die Evangelische Kirche) is a national organization in Germany. It encompasses 24 regional churches (Landeskirchen) which are either Lutheran, Reformed (Calvinist), or United. With the exception of Bavaria, the boundaries of the regional churches do not correspond to the modern state boundaries, but to boundaries of the German states in the early nineteenth century. The current affiliations of the regional churches correspond to the historical affiliations of the states in which they were once located, and each regional church has local member congregations of the same denomination. The term "Protestant Church" in this article refers to this specific organization. The term does not refer to Protestants who are not members of this organization, including, for example, Baptists, Mennonites, or those who belong to a Lutheran, Reformed or United congregation in a region in which the Protestant Church has a different regional church affiliation. See Otto Frhr. von Campenhausen, *Die*

than it did even ten years ago, as well as wide regional differences in religious beliefs.⁷ In 1961, more than ninety-five percent of West Germans belonged to one of the two main churches,⁸ but by 1987 this number had sunk to around eighty-four percent;⁹ after reunification it fell to around sixty-seven percent in Germany as a whole, and to less than thirty percent in the former East German states.¹⁰

These changes have created difficulties for the relationship between religion and government under Germany's Basic Law. The Basic Law, which prohibits a "state church" and guarantees the free exercise of religion, rejects "strict separation" in part by protecting certain institutional relationships between the states and religious organizations.¹¹ In practice, these institutions have included primarily the large Protestant and Catholic churches.¹² Three of the most contentious religion cases in the history of the Federal Republic of Germany are now pending in the courts; in all three, traditional religious minorities¹³ are challenging the institutional relationship between the large churches and the government.¹⁴

The first case, now before the Federal Constitutional Court, involves an action to compel the state of Berlin to award a group of Jehovah's Witnesses special status as a "corporate body under

Organization der evangelischen Kirche [The Organization of the Protestant Church], in 1 HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 381, 381-96 (Joseph Listl & Dietrich Pirson eds., 2d ed. 1994).

7. See *Dearest Jesus*, *supra* note 5, at 59.

8. See STATISTICAL YEARBOOK 1974, *supra* note 2, at 47. Reference to the two "main," "principle," or "large" churches means the Catholic church and the Protestant church as described in footnote 6.

9. See STATISTICAL YEARBOOK 1997, *supra* note 2, at 63.

10. See *id.* at 97-98; see also *Dearest Jesus*, *supra* note 5, at 59 (describing the weakness of organized religion in the former East Germany and the decline of the churches in Germany generally).

11. See *infra* text accompanying notes 99-103.

12. Alexander Hollerbach, *Grundlagen des Staatskirchenrechts [Foundations of the Public Law of Churches]*, in 6 HANDBUCH DES STAATSRCHTS DER BUNDESREPUBLIK DEUTSCHLAND 471, 540, 546-47 (Josef Isensee & Paul Kirchhof eds., 1989) [hereinafter *Public Law of Churches*]; Stefan Koriath, *Islamischer Religionsunterricht und Art. 7 III GG [Islamic Religious Instruction and Article 7 III of the Basic Law]*, 16 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVWZ] 1041, 1046-47 (1997).

13. This term includes everyone not affiliated with the main Protestant and Catholic churches and those with no religious affiliation. See also *infra* text accompanying note 167.

14. Federal Administrative Court, June 26, 1997, *reprinted in* 50 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2397 (1997) (Jehovah's Witnesses case); 93 Entscheidungen des Bundesverfassungsgerichts [Decisions of the Federal; Constitutional Court] [BVerfGE] 1 (1995) (classroom crucifixes case). The case concerning religious instruction in Brandenburg, discussed *infra* in Section IV.A.1., has not reached a decision.

public law,"¹⁵ a status that the large churches already enjoy, and which brings with it privileges such as the power to collect taxes from church members through the state.¹⁶ Eligibility of the Jehovah's Witnesses for this status hinges on (1) whether the group offers the requisite "loyalty to the state" even though its members may not vote, and (2) whether the "loyalty to the state" criterion itself infringes the group's religious liberties.¹⁷ The case is widely viewed as an important precedent for how the German states and courts will resolve bids by Muslim groups for this status.¹⁸

In the second case, the former East German state of Brandenburg, whose residents are overwhelmingly without religious affiliation, refuses to provide religious instruction in the schools pursuant to Article Seven of the Basic Law.¹⁹ Parents and churches have brought suit in the Federal Constitutional Court to force Brandenburg to comply with Article Seven.²⁰ In the third case, the Federal Constitutional Court struck down a law providing for crosses in Bavarian public school classrooms, a decision that shocked and outraged scholars and the general public.²¹ Bavaria responded by amending its law—which still provides that public school classrooms shall include a cross—to permit local school officials to remove the crosses when confronted with objections from parents or students.²² The Bavarian Constitutional Court upheld the new law against a facial attack on August 1, 1997, in a decision that will probably be considered soon by the Federal Constitutional Court.²³

As Germany confronts the problems that come with religious pluralism, the United States increasingly struggles with the problem of how to include religion in public life. This shift arises in part from the force of a point long made in Germany, namely that excluding religion from public life improperly disadvantages it, and the related argument that secularism has no special claim to constitutional legitimacy. Both have reached a crescendo in

15. See Federal Administrative Court, June 26, 1997, *reprinted in* 50 NJW 2397 (1997) (Jehovah's Witnesses).

16. See *infra* Part IV.B.

17. See *id.*

18. See *infra* note 198.

19. See *infra* Part IV.A.1.

20. See *id.*

21. 93 BVerfGE 1 (classroom crucifixes case).

22. See *infra* Part V.A.3.

23. The Court has rejected two challenges to the law on procedural grounds, while other challenges are pending in the Bavarian courts. See *infra* note 402.

the United States,²⁴ and the Supreme Court's response is clear. From *Rosenberger v. Rector*²⁵ and *Capitol Square Review & Advisory Board v. Pinette*²⁶ to *Bowen v. Kendrick*²⁷ and *Agostini v. Felton*,²⁸ religion is increasingly finding its way into the public sphere. Yet even as we usher out "separation,"²⁹ we have no clear vision of how greater integration will function. When and how, for example, may the government engage in religious speech? What are the limits on the government's power to fund religious organizations as part of a "neutral" general program? The tendency of courts and commentators alike is to increasingly view the heart of the Establishment Clause as the protection of individual religious freedom, rather than the structural separation

24. For representative examples, see STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 105-23 (1993) [hereinafter CARTER, THE CULTURE OF DISBELIEF]; FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE 29-43, 117-22 (1995); STEPHEN V. MONSMA, POSITIVE NEUTRALITY: LETTING RELIGIOUS FREEDOM RING (1993); Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 724-26 (1997); Mark E. Chopko, *Religious Access to Public Programs and Government Funding*, 60 GEO. WASH. L. REV. 645, 653-71 (1992); W. Cole Durham, Jr. & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimension of Religious Institutions*, 1993 B.Y.U. L. REV. 421, 456-60; Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990) [hereinafter Laycock, *Neutrality Toward Religion*]; Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 129, 168-69, 175-94 (1992) [hereinafter McConnell, *Crossroads*]; Richard S. Myers, *The Supreme Court and Privatization of Religion*, 41 CATH. U. L. REV. 19, 21-25 (1991); Micheal Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 658-62 (1996) [hereinafter Paulsen, *A Funny Thing*]; Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 995-1003 (1989); E. Gregory Wallace, *When Government Speaks Religiously*, 21 FLA. ST. U. L. REV. 1183, 1187-1202 (1994). For the best argument that the Constitution does establish a secular public order, see Katherine M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992).

25. 515 U.S. 819 (1995) (rejecting Ohio's claim that the Establishment Clause required it to bar the Ku Klux Klan from placing a cross in a public plaza in front of the Ohio statehouse).

26. 515 U.S. 753 (1995) (holding that a university funding program for student publications could not exclude otherwise eligible religious publications).

27. 487 U.S. 589 (1988) (rejecting a facial Establishment Clause challenge to the Adolescent Family Life Act, which provides cash grants to both religious and secular organizations for counseling and research on adolescent sexuality).

28. 521 U.S. 203 (1997) (reversing *Aguilar v. Felton*, 473 U.S. 402 (1985), and upholding a federal program that provides remedial assistance to disadvantaged private school students, most of whom attend parochial schools, where much of the remedial instruction takes place).

29. See generally Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994).

of religion and government.³⁰ This shift has brought American and German case law considerably closer in Establishment Clause matters; German cases, it turns out, suggest several limitations on the notion that individual liberty should be the sole engine of Establishment Clause jurisprudence.³¹

This Article considers the three prominent cases in Germany and how they speak to pressing Establishment Clause issues in the United States. The case involving religious instruction in the schools and the Jehovah's Witnesses case question the legitimate secular goals that the government may pursue through funding or support of religious organizations, an issue that remains open in the United States. The third case, crosses in public schools, raises questions of government religious speech similar to those that continue to divide the Supreme Court and scholars in the United States. In both areas, the German cases illustrate weaknesses in an approach to the Establishment Clause that views the clause as a means of protecting private religious choice from government pressure and influence.

Section II outlines the American context for these issues, focusing on the growing importance of private religious choice analysis in the case law and literature, and concluding with a summary of what the German cases suggest for American private choice reasoning. Section III gives a brief overview of the Articles of the Basic Law that protect religious freedoms. Section IV takes up the Jehovah's Witnesses and religious instruction cases and argues that they suggest weaknesses in the private religious choice analysis in government funding cases in the United States. Finally, Section V addresses the dispute surrounding crosses in the Bavarian schools and the limitations of private religious choice analysis in government religious speech cases.

II. PRIVATE RELIGIOUS CHOICE IN AMERICAN JURISPRUDENCE

Early Establishment Clause cases worked from the premise that government and religion should remain separate.³²

30. See *infra* Part II.

31. See *infra* Parts IV.C., V.B.

32. See, e.g., *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970); *Epperson v. Arkansas*, 393 U.S. 97, 103-07 (1968); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 217 (1963); *Engel v. Vitale*, 370 U.S. 421, 425 (1962); *Zorach v. Clausen*, 343 U.S. 306, 312 (1952); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 212 (1948); *Everson v. Board of Educ.*, 330 U.S. 1, 15-16, 51-52 (Rutledge J., dissenting) (1947). See generally *Ira C. Lupu*, *supra* note 29, at 233-37. Although there is some disagreement about how accurately the word "separation" captures the Court's approach even in early cases, see Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 48, 53-65 (1997).

Separation, the Court reasoned, protects both religion and government from the potentially damaging influence of the other,³³ discourages sectarian rivalries,³⁴ and keeps the government "neutral."³⁵ This logic produced the infamous *Lemon* test, which requires that government action (1) have a secular purpose, (2) that it neither advance nor inhibit religion, and (3) that it avoid entanglement of government and religion.³⁶ Separation, as the *Lemon* test suggests, is driven largely by concerns about the institutional relationship between government and religion, not "coercion, loss of liberty, or other individualized interests."³⁷

Private religious beliefs have always, however, created difficulties for the separationist position. In cases involving financial aid to religious organizations, separation itself was at times justified on the grounds that the government may not coerce taxpayers to support (through public financing) religious beliefs with which they disagree.³⁸ But private religious beliefs also provided the basis for what would become a successful challenge to the core of the separationist position. As Justice Stewart pointed out in his lone dissent in *Abington School District v. Schempp*,³⁹ secular compulsory public schools cannot be defended as "neutral" to those who favor religious education for their children.⁴⁰ Professor Giannella similarly attacked separation as non-neutral in a religious society, reasoning by

[hereinafter Laycock, *Underlying Unity*], the Author uses it because the Court described and legitimated its reasoning in this way.

33. See *Schempp*, 374 U.S. at 259 (Brennan, J., concurring); *Everson*, 330 U.S. at 26-27 (Jackson, J., dissenting); *Engel*, 370 U.S. at 430-35; *McCollum*, 333 U.S. at 212.

34. See *Lemon v. Kurtzman*, 403 U.S. 602, 622-24 (1971); *Epperson*, 393 U.S. 97, 104; *Engel*, 370 U.S. at 442-44 (Douglas, J., concurring); *Zorach*, 343 U.S. at 318-19 (Black, J., dissenting); *McCollum*, 333 U.S. at 216-17 (Frankfurter, J., concurring); *Everson*, 330 U.S. at 27 (Jackson, J., dissenting); 53-54 (Rutledge, J., dissenting).

35. See *Schempp*, 374 U.S. at 222; *Engel*, 370 U.S. at 443 (Douglas, J., concurring); *McCollum*, 333 U.S. at 211-12; *Zorach*, 343 U.S. at 318 (Black, J., dissenting).

36. *Lemon*, 403 U.S. at 612-13.

37. Lupu, *supra* note 29, at 235.

38. See *Board of Educ. v. Allen*, 392 U.S. 236, 251-52 (1968) (Black, J., dissenting); see also Lupu, *supra* note 29, at 235 (explaining that the Court created an exception in Establishment Clause cases to the rule against taxpayer standing, but reasoning that this "reinforced the character of the clause as a polity principle rather than a rights principle" because a rights system "limits party status to those . . . whose own interests are sharply implicated by governmental action").

39. 374 U.S. 203 (1963).

40. *Id.* at 312 (Stewart, J., dissenting); see also *McCollum*, 333 U.S. at 235 (Jackson, J., concurring).

hypothesis that an all-powerful state would have to build churches in order to remain neutral toward the religious practices of its people.⁴¹ Ultimately, the Court itself failed to follow through on its separationist promise. Instead, it upheld a number of government practices that “aided” religion on the grounds that to deny religious groups the services or money in question would “hamper . . . citizens in the free exercise of their own religion,”⁴² or because the financial benefit of the aid accrued largely to private individuals who chose to direct the assistance in ways that benefited religious organizations.⁴³

By the 1990s the argument that the Court improperly disadvantaged religion by promoting an overly secular state had moved to center stage in Establishment Clause scholarship,⁴⁴ in part due to general post-modern attacks on the entire project of

41. Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 522-23 (1968).

42. *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (permitting states to reimburse parents for costs of public transportation to both secular and religious private schools).

43. See *Allen*, 392 U.S. at 238-49 (upholding a program loaning secular textbooks to students in both public and private schools); see also Laycock, *Underlying Unity*, *supra* note 32, at 47-48, 53-65 (describing tension between “no-aid” and “non-discrimination” approaches and pointing out that “no-aid” was always strongest in the context of parochial schools and never had a complete hold on the Court); McConnell, *Crossroads*, *supra* note 24, at 119-20 (listing bizarre and inconsistent outcomes under *Lemon*). Even those firmly committed to the goal of separation found private religious practices troubling. Justice Brennan, for example, concluded that the holiday displays in *Lynch v. Donnelly* were unconstitutional, but wrote that “[i]ntuition tells us that some official ‘acknowledgment’ is inevitable in a religious society if government is not to adopt a stilted indifference to the religious life of the people.” 465 U.S. 668, 714 (1984) (Brennan, J., dissenting). Thus government officials are not prevented from “tak[ing] account, when necessary, of the separate existence and significance of the religious institutions and practices in the society they govern.” *Id.* This gesture to the religious institutions of the “people” had little, however, to do with most of the speech that Justice Brennan concluded would not violate the Constitution: that which had lost its religious meaning through repeated use, that which is useful to the government for “solemnizing public occasions” or that which recognizes national history and culture. *Id.* at 715-17. The starting assumption that such speech represented the “people’s” institutions went unexamined, and the filters used to strain out unconstitutional (or constitutional) speech had little to do with this underlying rationale.

44. See GEDICKS, *supra* note 24, at 117-25; STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 82-83, 99-117 (1995) [hereinafter SMITH, *FOREORDAINED FAILURE*]; Berg, *supra* note 24, at 705, 721-26; Chopko, *supra* note 24, at 656-60; Laycock, *Neutrality Toward Religion*, *supra* note 24, at 1003-04; McConnell, *Crossroads*, *supra* note 24, at 117-34; Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 800-11 (1993) [hereinafter Paulsen, *Lemon is Dead*].

neutrality.⁴⁵ A powerful and pervasive government that excludes religion from public life, critics argued, marginalizes religion and fails to recognize that a secular state has no special claim to either neutrality or constitutional legitimacy.⁴⁶ As a result, scholars increasingly focus on government's impact on individual autonomy, reasoning that the Establishment Clause guards against government influence on religious choice or "personal choices concerning religious beliefs and practices."⁴⁷ The term "private religious choice" in this Article refers to these "personal choices" or, stated another way, "the individual process of reaching and practicing religious beliefs."⁴⁸

The claim that religion should "flourish according to the zeal of its adherents and the appeal of its dogma,"⁴⁹ without the

45. See GEDICKS, *supra* note 24, at 9-10, 29-37; Durham & Dushku, *supra* note 24, at 443-46; McConnell, *Crossroads*, *supra* note 24, at 134-35. This also gives rise to the claim that liberalism and deeply held religious belief are at odds because liberalism privileges those who debate based on "reason" and marginalizes those whose argue based on transcendent powers. See CARTER, *THE CULTURE OF DISBELIEF*, *supra* note 24, at 213-32 (arguing that modern liberalism improperly excludes religious reasoning); Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255 (1997) (arguing that deeply held religious beliefs and liberalism are inherently incompatible). For an attempt to justify liberalism's privileging of certain types of reasoning from the perspective of those with deeply held transcendent views (including religion), see John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

46. See GEDICKS, *supra* note 24, at 117-25; SMITH, *FOREORDAINED FAILURE* *supra* note 44, at 82-83, 99-117; Berg, *supra* note 24, at 705, 721-26; Chopko, *supra* note 24, at 656-60; Laycock, *Neutrality Toward Religion*, *supra* note 24, at 1003-04; McConnell, *Crossroads*, *supra* note 24, at 117-34; Paulsen, *Lemon is Dead*, *supra* note 44, at 800-11.

47. Carl H. Esbeck, *A Constitutional Case for Government Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 25-26 (1997); see also JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* 9 (1995) [hereinafter CHOPER, *SECURING RELIGIOUS LIBERTY*]; STEPHEN V. MONSMA, *WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY* 111-14 (1996); Berg, *supra* note 24, at 703; Stephen L. Carter, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 130-134 (1993) [hereinafter Carter, *The Resurrection?*]; Laycock, *Neutrality Toward Religion*, *supra* note 24, at 1001-02; McConnell, *Crossroads*, *supra* note 24, at 168-69, 175; Wallace, *supra* note 24, at 1255.

48. Wallace, *supra* note 24, at 1255 (citing McConnell, *Crossroads*, *supra* note 24, at 175). There are some difficulties with this term. For many, religious actions are not the product of "personal choice," but of divine commandment, and religious beliefs themselves are not "chosen" but imposed by a higher authority. MICHAEL SANDEL, *DEMOCRACY'S DISCONTENT* 6 (1996). The term "private religious choice" refers to the government in the sense that "choice" is something that the government distorts and constrains, but the term, as used here, does not exclude divinely imposed beliefs or actions.

49. *Zorach v. Clausen*, 343 U.S. 306, 313 (1952); see also *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963). Early commentary that advanced this position includes Alan Schwarz, *No Imposition of Religion: The Establishment*

influence of government, is not new. However, the focus on individual autonomy generally, and private religious choice specifically, has unquestionably moved from the perimeter to the center of Establishment Clause scholarship, even if it has not led to agreement on how the courts should resolve specific issues.⁵⁰

Private religious choice forms the core of a particularly influential approach to the religion clauses, which is advanced most prominently by Professors McConnell and Laycock. This position's "underlying principle" holds that "governmental action should have the minimum possible effect on religion."⁵¹ Government violates the Free Exercise Clause by "inhibiting religious practice," and it violates the Establishment Clause "by forcing or inducing . . . contrary religious practice[s]."⁵² Termed "religious pluralism,"⁵³ "voluntarism,"⁵⁴ or "substantive neutrality,"⁵⁵ this reasoning from private religious choice holds that the government may not exclude religious speech from a public forum simply because it is religious, nor may it deny otherwise qualified religious groups access to government funding.⁵⁶ If the government excludes religious groups from public programs and fora, it creates incentives for such groups to secularize; through these incentives, the government distorts private religious decision-making and thus violates the Constitution.⁵⁷

Clause Value, 77 YALE L.J. 692 (1968) and Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion under the First Amendment*, 45 U. CHI. L. REV. 805 (1978).

50. Compare, CHOPER, SECURING RELIGIOUS LIBERTY, *supra* note 47, at 121 n.67, with McConnell, *Crossroads*, *supra* note 24, at 183-86, and Douglas G. Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES, 313, 348-52 (1996) [hereinafter Laycock, *Religious Liberty as Liberty*], with Wallace, *supra* note 24, at 1254-55.

51. McConnell, *Crossroads*, *supra* note 24, at 169; see Laycock, *Religious Liberty as Liberty*, *supra* note 50, at 313.

52. McConnell, *Crossroads*, *supra* note 24, at 169.

53. *Id.*

54. See Berg, *supra* note 24, at 694, 705. The term "voluntarist" has other meanings even in Establishment Clause jurisprudence. See also SANDEL, *supra* note 48, at 62-65 (1996) (using the term in a similar way but also to capture the view that religion itself is a choice, or a "life-style," and arguing that this view leads to cases that refuse special protections for religious liberty, because religion is treated simply as one choice among many, a position that McConnell and Laycock would reject).

55. Laycock, *Neutrality Toward Religion*, *supra* note 24, at 1001.

56. See Laycock, *Religious Liberty as Liberty*, *supra* note 50, at 349-52; McConnell, *Crossroads*, *supra* note 24, at 183-88.

57. See Laycock, *Religious Liberty as Liberty*, *supra* note 50, at 349-53. Professor Choper reasons that government violates individual liberty when it taxes constituents and then finances "core" religious activities with which they disagree. Jesse H. Choper, *Dangers to Religious Liberty from Neutral Government*

The Court has responded to the attack on separation by all but abandoning the *Lemon* framework and the institutional concerns on which it rests.⁵⁸ In its place, the Court has tended to retreat to high ground, leaving more to the political process.⁵⁹ As Justice Kennedy explained in *Allegheny*:

the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society A categorical approach would install federal courts as jealous guardians of an absolute "wall of separation," sending a clear message of disapproval. In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.⁶⁰

Justice Kennedy concluded that the government can "accommodate"⁶¹ religion by "declaring public holidays," "installing or permitting festive displays," and "sponsoring celebrations and parades" because "the principles of the Establishment Clause and our Nation's historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgment of holidays with both cultural and religious aspects."⁶²

The Court also, however, increasingly resolves Establishment Clause cases by considering the relationship between the government action and private religious choices. For example, the Court now routinely holds that religious speech in public schools and in public fora that is attributable to individual private speakers and their choices does not violate the Establishment

Programs, 29 U.C. DAVIS L. REV. 719, 727 (1996). The pluralist position reasons that a taxpayer's interests do not extend to neutral funding programs that also happen to advance religion. See McConnell, *Crossroads*, *supra* note 24, at 185-86. Although Choper describes a "broad consensus" that taxes in support of religious activities pose the "central threat" to religious liberties, CHOPER, *SECURING RELIGIOUS LIBERTY*, *supra* note 47, at 16, he offers little to support this claim. See Christopher L. Eisgruber & Lawrence G. Sager, *Unthinking Religious Freedom*, 74 TEX. L. REV. 577, 584-586 (1996) (describing Choper's claim as "simply untrue").

58. For the most recent example, see *Agostini v. Felton*, 117 S.Ct. 1997 (1997). See generally Paulsen, *Lemon is Dead*, *supra* note 44, at 813-25.

59. See McConnell, *Crossroads*, *supra* note 24, at 137-68.

60. *County of Allegheny v. ACLU*, 492 U.S. 573, 657-58 (1989) (Kennedy, J., dissenting) (citations omitted).

61. *Id.* at 664. Justice Kennedy has been criticized for his use of the term "accommodation" here by those who interpret "accommodation" as the lifting of a government-imposed burden on religious exercise by private individuals. See Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2171-73 (1996); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 687 (1992).

62. See *County of Allegheny*, 492 U.S. at 663 (Kennedy, J., dissenting).

Clause if the school or the fora is generally open to similar non-religious speech.⁶³

Government religious speech cases typically turn on the impact of the speech and the setting on individual listeners and observers.⁶⁴ In cases involving aid to religious organizations, a majority of the Court focuses on the role of private choice as the vehicle directing the aid to the organization in question.⁶⁵ Perhaps no case illustrates the Court's shift better than the 1997 *Agostini* decision, when the Court reversed its 1985 decision in the same

63. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 752 (1995) (holding that the placement of a cross by the Ku Klux Klan in a public square near the Ohio capitol building did not violate the Establishment Clause); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (holding that Christian films shown on public school property are consistent with other uses of the property and not a violation of the Establishment Clause); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding that the Christian Club could meet on school premises, as other clubs did, without violating the Establishment Clause); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that religious student groups could meet on campus like other student groups without violating the Establishment Clause). In all four cases, the government relied on the Establishment Clause as a defense to the claim that it infringed on the free speech rights of the plaintiffs. The Court's rejection of the defense meant that the government had to give the religious groups access to the public space in question.

64. *Lee v. Weisman*, 505 U.S. 577 (1992) (striking down a high school commencement prayer), illustrates just how much the Court's reasoning has changed. In *Weisman*, five members of the Court embraced some version of the "coercion test," which asks, in this context, whether the government's actions coerce participation in a "formal religious exercise." *Id.* at 586. In *Engel*, on the other hand, the Court invalidated a prayer written by state officials and recited in public school classrooms, but based its reasoning entirely on the role of the government in drafting the prayers, emphasizing that a showing of coercion was unnecessary to prove an Establishment Clause violation. *Engel v. Vitale*, 370 U.S. 421, 430-35 (1962). Justice Kennedy considered the government's role in sponsoring and shaping the contents of the prayer in *Weisman* as well, but in order to show that the prayer qualified as government, not private, speech. His inquiry did not end there, as it could have under *Engel*, but went on to hold that the social pressures on the student to *participate* in the prayer made it unconstitutional. The four members of the Court who did not apply a test based solely on coercion reasoned that "endorsement" falling short of "coercion" can violate the Establishment Clause, relying in part on institutional concerns. *Weisman*, 505 U.S. at 604-08 (Blackmun, J., concurring).

65. See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1992) (upholding state-funded sign-language interpreter for a student who chose to attend a religious high school); *Agostini v. Felton*, 117 S.Ct. 1997 (1997) (reversing *Aguilar v. Felton*, 473 U.S. 402 (1985), and permitting state teachers to conduct remedial instruction classes in private schools); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 832-34 (1995) (upholding aid to student religious publications as part of a general program of aid to student publications); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (upholding educational grant to blind student who chose to attend a Christian college).

case.⁶⁶ Public funding pursuant to “criteria that neither favor[s] nor disfavor[s] religion,”⁶⁷ the five member majority reasoned, ensures that if public resources ultimately go to religious institutions they do so via individual private choice (in this case to parochial schools).⁶⁸ Moreover, “neutral” funding criteria do not “give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services,” and accordingly insulate the program from Establishment Clause claims.⁶⁹ This is precisely the logic and the language of the pluralist position.⁷⁰

German cases and commentary, as the balance of this Article argues, illustrate a number of problems for pluralist reasoning. In funding cases, pluralists push to ensure that religious groups may participate in public welfare programs on the same terms as secular groups.⁷¹ By including religious groups, they reason, the government creates no incentives for such groups to secularize in order to receive government funding.⁷² The government has, however, a great deal of power to promote certain messages or viewpoints with its own money, and the German cases make clear that this power has the potential to impact private religious beliefs and choice when religious groups are included in general funding programs.

The German government and Basic Law, for example, provide support to religious organizations in part because they foster personal values that the government and the drafters of the Basic Law deemed important to the success of democracy.⁷³ The courts must now decide what criteria the government may use to distinguish among religious groups to advance this goal. Similarly, in the United States, as public programs fund religious groups to advance secular purposes, those purposes themselves, and the criteria they create for public funding, have the potential to distort the practices of the groups that participate, or hope to participate.⁷⁴ When, if ever, does the distortion based on secular

66. *Aguilar v. Felton*, 473 U.S. 402 (1985).

67. *Agostini*, 117 S. Ct. at 2014.

68. *See id.* at 2011-12. The dissent strongly disagreed with this characterization of the facts, reasoning that in this case a public agency provides aid directly to schools, not to, or at the explicit request of, students. *See id.* at 2024-25 (Souter, J., dissenting). The four member dissent also relied on institutional concerns that animated the separationist position: government support compromises religion and creates strife. *Id.* at 2020.

69. *Id.* at 2014.

70. *See supra* notes 51-57 and accompanying text.

71. *McConnell*, *supra* note 24, at 180, 183-88; Laycock, *Religious Liberty as Liberty*, *supra* note 50, at 349-53.

72. *Id.*

73. *See infra* Part IV.

74. This observation of course is not new. Protecting religion from the influences of government has long been understood as central to the religion

criteria become so great as to violate the Constitution? I argue in Section IV(C) that an analysis of individual religious choice provides an answer to establishment questions only when it is considered in terms of the goals served by private religious choice in what some have termed "responsive democracy."⁷⁵

German cases discussed in Section V also give reason to question the relationship between government religious speech and private religious choice. In this country, advocates of pluralism are sharply split over the problem of government religious speech. Some reason that the "closest approximation to substantive neutrality is for government to be silent on religious matters," because "[g]overnment is large and highly visible," and will invariably favor one religious group, or "it would model one form of religious speech or observance as compared to others."⁷⁶ Others argue, as the German courts do, that purely secular speech by the government has exactly the same power to influence private views of the listener toward the secular instead of the religious.⁷⁷ Government should thus "mirror[]" the religious life of "the culture as a whole," when it engages in religious speech by, for example, installing many kinds of religious and cultural symbols throughout the year.⁷⁸ What this version of the pluralist view does not want, however, is government religious speech that represents only a watered-down, broadly acceptable version of private religion, because this distorts private practices and favors "government-induced homogeneity" or a "civil religion."⁷⁹

clauses, and a reason to insist that government and religion remain separate. "It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 259 (1963) (Brennan, J., concurring). Those advocating participation of religious groups in public welfare programs, however, which includes every author cited in footnote 31, fail to discuss this point.

75. See *infra* text accompanying notes 286-97.

76. Laycock, *Underlying Unity*, *supra* note 32, at 72; see also Berg, *supra* note 24, at 745; Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 843-44 (1992). Many others who do not subscribe to the voluntarist position also reject religious speech by the government. See, e.g., Epstein, *supra* note 61; Marvin E. Frankel, *Religion in Public Life—Reasons for Minimal Access*, 60 GEO. WASH. L. REV. 633 (1992); Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503 (1992).

77. See Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 161-166 (1986); Wallace, *supra* note 24, at 1255-56.

78. McConnell, *Crossroads*, *supra* note 24, at 193.

79. *Id.* at 168-69, 190.

The German courts have long focused on individual autonomy as the key to government religious speech cases and have applied three corresponding limitations on government religious speech: (1) the speech must not take place in a coercive setting, (2) it must avoid "proselytization," and (3) it must correspond to private religious speech, as constituents choose to express that speech in public space.⁸⁰ With the rhetoric of separation on the wane, U.S. courts have relied increasingly on "coercion" and the dangers that it poses for religious freedom in resolving government religious speech cases.⁸¹ The two countries now both face the question of what exactly qualifies as unconstitutional coercion. An even more difficult question arises, however, in explaining exactly how the constitutions limit government religious speech that is *not* coercive. Many have reasoned that the government may not engage in "proselytization,"⁸² or that it may not "endorse" a religion, religion generally, or non-religion, because of its impact on the listener.⁸³ The furor around the German crucifix case challenges an approach based on the autonomy of the listener by asking what we make of government religious speech with which all listeners agree.⁸⁴ The answer comes again, I argue in Section V(B)(2), from a normative view of how the political system should function, and not solely from the goal of protecting private choice.⁸⁵

The third German perspective may be the most foreign to the American reader: German courts insist that government religious speech, particularly in the schools, can advance the religious freedoms and choices of individual constituents who want the government to engage in that speech.⁸⁶ This justification relies both on constituents' private religious practices *and* on individuals' preferences as to how those practices get expressed in public space. This approach both builds on and attacks McConnell's notion of pluralist "mirroring."⁸⁷ The Germans mix this "mirroring" with the somewhat conflicting justification that the speech must also correspond to the greatest degree possible to a consensus of the community's religious desires. Professor McConnell seeks to avoid such "consensus" or "majority" speech

80. See *infra* Part V.A.

81. See *Lee v. Weisman*, 505 U.S. 577 (1992); *County of Allegheny v. ACLU*, 492 U.S. 573, 660 (1989) (Kennedy, J., dissenting).

82. *County of Allegheny*, 492 U.S. at 660 (Kennedy, J., dissenting).

83. See *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

84. See *infra* notes 436-39 and accompanying text.

85. See *infra* notes 440-42 and accompanying text.

86. See *infra* notes 443-47 and accompanying text.

87. See McConnell, *Crossroads*, *supra* note 24, at 193.

because it tends to distort actual private religious practices.⁸⁸ McConnell's position may provide a theoretically attractive way of reconciling government speech and private religious choice, but it provides no way of realizing this goal in a democratic system. Assuming that government speech is either the product of majority capture or some sort of consensus, neither provides the "mirroring" that the pluralist position seeks. The German cases, on the other hand, focus on compromise and consensus as normative guides for how local officials should function. Section V(B)(3) takes up these issues.⁸⁹

III. OVERVIEW OF RELIGION AND THE GERMAN CONSTITUTION

The German Constitution provides extensive protection for religious freedoms. Article Four makes "inviolable" "freedom of faith and of conscience" and "the freedom to profess a religion or a particular philosophy."⁹⁰ It also guarantees the "undisturbed practice of religion," the right to refuse military service "involving the use of arms,"⁹¹ and that no one may be "disadvantaged or favored" based on religious or political opinions.⁹² A series of Articles incorporated into the Basic Law by reference to the Weimar Constitution of 1919⁹³ provide even more detailed rights:⁹⁴ eligibility for public office and the enjoyment of civil and political rights are "independent of religious denomination,"⁹⁵ no one may be compelled to disclose their religious convictions,⁹⁶ to take "a religious form of oath," or to participate or perform any

88. See *id.* at 168-69, 188.

89. See *infra* text accompanying notes 441-92.

90. GRUNDGESETZ [Constitution] [GG] art. 4(1) (F.R.G.). All translations of the text of the Basic Law are those of the German government in its English language version of the Basic Law. The government's entire translation of the Basic Law is reprinted in DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 343-412 (1994).

91. GG arts. 4(2), 4(3). The Basic Law does not explicitly limit these liberties, in contrast to the protections afforded to religious self government. See CURRIE, *supra* note 90, at 263. The Court has held, however, that the religious freedoms protected in Article Four are limited by other constitutional rights protected by the Basic Law. *Id.* at 252-55.

92. GG art. 3(3).

93. Although the Weimar Republic lasted only from 1919 until 1933, in part because of problems with the Constitution, it did include a comprehensive Bill of Rights. CURRIE, *supra* note 90, at 5-6.

94. Article 140 of the German Constitution formally incorporates these sections of the Weimar Constitution into the Basic Law.

95. WEIMARER REICHsverfassung [Constitution] art. 136(1), 136(2) (Weimar Republic) [hereinafter WRV].

96. See WRV art. 136(3).

religious act;⁹⁷ freedom of religious association is guaranteed, as is the right of religious associations to own property and acquire legal capacity.⁹⁸ The autonomy of every religious body in the administration of its own affairs is guaranteed "within the limits of the law valid for all."⁹⁹

The Basic Law provides, again by reference to the Weimar Constitution, that "there shall be no state church."¹⁰⁰ It explicitly protects, however, Sunday and public holidays as "days of rest from work and of spiritual edification."¹⁰¹ Moreover, the Basic Law preserves several institutions in which state and religious bodies cooperate closely. Religious groups, for example, "shall remain corporate bodies under public law insofar as they have been in the past," and such corporate bodies "shall be entitled to levy taxes in accordance with [state] law on the basis of the civil taxation lists."¹⁰² Article Seven provides that voluntary religious instruction "shall form part of the ordinary curriculum in public schools."¹⁰³ Neither institution is, however, limited to particular churches or religious groups, and Article 137 (5) of the Weimar Constitution explicitly provides that other religious groups may become corporate bodies under the public law if "their constitution and the number of their members offer assurance of their permanency."¹⁰⁴ The extent to which this status and religious instruction in the schools must be opened to other religious groups, or modified in light of the religious diversity of the country, is the question now facing the German courts.

97. WRV art. 136(4).

98. See WRV art. 137(4), 138(2).

99. WRV art. 137(2)-(4). This limitation has not kept the Court from requiring exceptions from generally applicable laws where those laws infringe on the rights of religious groups to self-government. The Court has reasoned instead that laws with greater impact on religious groups are not "laws that apply to everyone," and on this basis has required a number of exceptions for religious groups from laws governing the rights of employees, the internal management of hospitals, and labor relations. CURRIE, *supra* note 90, at 263-66; see also Donald P. Kommers, *West German Constitutionalism and Church-State Relations*, in GERMAN POLITICS & SOCIETY 11, 16 (1990).

100. WRV art. 137(1).

101. WRV art. 139.

102. WRV art. 137(5), 137(6).

103. GG art. 7(3).

104. WRV art. 137(5).

IV. GOVERNMENT PROMOTION OF "DEMOCRACY"
AND PRIVATE RELIGIOUS CHOICE

Religious instruction and the status "corporate body under public law" have long historical pedigrees in Germany.¹⁰⁵ The Weimar Constitution of 1919, like the Basic Law of 1949, *preserved* both institutions, which already had a firm place in German society.¹⁰⁶ Nonetheless, the framers of both constitutions debated at length about whether to protect the institutions; many argued in both 1919 and 1949 for greater separation of church and state.¹⁰⁷ The decision in 1949 to simply adopt the language of the Weimar Constitution is understood as a "formal compromise;" the drafters, in other words, punted.¹⁰⁸

The institutions are justified as important to the success of a peaceful, democratic Germany. Commentators reason that religion provides a basis for moral and ethical values essential to both the success of democratic government and the well-being of the people.¹⁰⁹ As Professor Böckenförde, former Judge on the Federal Constitutional Court, famously put it: "the free and secular state depends on conditions that it cannot itself guarantee."¹¹⁰ Religious groups serve these purposes by developing "morally responsible people,"¹¹¹ citizens bound by ethics and notions of responsibility,¹¹² or people with "tolerant"

105. Churches' status as corporate bodies under public law dates back to the 17th century. See ALFRED ENDRÓS, ENTSTEHUNG UND ENTWICKLUNG DES BEGRIFFS "KÖRPERSCHAFT DES ÖFFENTLICHEN RECHTS" [ORIGIN AND DEVELOPMENT OF THE CONCEPT OF "CORPORATE BODY UNDER PUBLIC LAW"] 14-16 (1985).

106. I OTTO VOLL, HANDBUCH DES BAYERSISCHEN STAATSKIRCHENRECHTS [HANDBOOK OF BAVARIAN PUBLIC LAW OF CHURCHES] 103 (1985); ENDRÓS, ORIGIN AND DEVELOPMENT OF THE CONCEPT OF "CORPORATE BODY UNDER PUBLIC LAW," *supra* note 105, at 12-25.

107. Hollerbach, *Public Law of Churches*, *supra* note 12, at 479-80, 485-88; Axel Frhr. von Campenhausen, *Zur Kreuzifix-Entscheidung des Bundesverfassungsgerichts* [On the Crucifix Decision of the Federal Constitutional Court], 121 ARCHIV DES ÖFFENTLICHEN RECHTS 448, 455-56 (1996) [hereinafter Axel Frhr. von Campenhausen, *On the Crucifix Decision*].

108. Hollerbach, *Public Law of Churches*, *supra* note 12, at 471, 479-80, 484-88.

109. *Id.* at 516, 525.

110. Ernst-Wolfgang Böckenförde, *Die Entstehung des Staates als Vorgang der Säkularisation* [The Origin of the State as a Process of Secularization], in STAAT, GESELLSCHAFT, FREIHEIT: STUDIEN ZUR STAATSTHEORIE UND ZUR VERFASSUNGSRECHT 60 (1976).

111. Hollerbach, *Public Law of Churches*, *supra* note 12, at 516, 525.

112. Christoph Link, *Religionsunterricht*, in II HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 507-09 (Joseph Listl & Dietrich Pirson eds., 2d ed. 1995) [hereinafter Link, *Religionsunterricht*].

and “democratic” sensibilities and “social responsibility on the basis of individual autonomy.”¹¹³ Both their participation in providing tangible public services such as daycare centers and hospitals, and their contribution to the personal basis of communal and political life, legitimize the special status that religious groups enjoy under the German constitution.¹¹⁴

Germany’s institutional protections for religious groups originally arose from the relationship between the government and the two large Christian churches.¹¹⁵ As long as the institutions included only traditional Christian groups, or others that shared a basic commitment to what the state saw as democratic values,¹¹⁶ it was easy to reconcile the government’s interest in promoting “democratic” values with the interests of religious autonomy. For example, the two large Churches, to which about ninety-five percent of the population belonged, appeared unlikely to use religion classes to undermine the state or its constitutional bases. This was as true in 1949 as it was in 1919. The horrors of National Socialism had weakened the position of the state, but generally strengthened the position of churches; churches were understood by many as both opponents and victims of the Third Reich and could, many hoped, give democracy a permanent home in Germany.¹¹⁷ Exactly the same

113. F. MÜLLER, DAS RECHT DER FREIEN SCHULE NACH DEM GG 135 [THE LAW OF FREE SCHOOLS UNDER ARTICLE 135 OF THE BASIC LAW] (2d ed. 1982).

114. For other examples see Hollerbach, *Public Law of Churches*, *supra* note 12, at 618-19, 664-65; GOTTFRIED HELD, DIE KLEINEN ÖFFENTLICHEN-RECHTLICHEN RELIGIONSGEMEINSCHAFTEN IM STAATSKIRCHENRECHT DER BUNDESREPUBLIK [SMALL PUBLIC LAW RELIGIOUS GROUPS IN THE PUBLIC LAW OF CHURCHES OF THE FEDERAL REPUBLIC OF GERMANY] 31-35 (1974); Paul Kirchhof, *Die Kirchen als Körperschaft des öffentlichen Rechts [Churches as Corporate Bodies Under Public Law]*, in I HANDBUCH DES STAATSKIRCHENRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 651, 651-53 (Joseph Listl & Dietrich Pirson eds., 2d ed. 1994); AXEL FRHR. VON CAMPENHAUSEN, ERZIEHUNGS-AUFTRAG UND STAATLICHE SCHULTRÄGERSCHAFT [THE TASK OF EDUCATION AND STATE SUPPORT OF SCHOOLS] 146 (1967) [hereinafter THE TASK OF EDUCATION]; VOLL, I HANDBOOK OF BAVARIAN PUBLIC LAW OF CHURCHES, *supra* note 106, at 105.

115. See HELD, *supra* note 114, at 45-49 (corporations under public law); Koriath, *supra* note 12, at 1046.

116. The institution of corporate bodies under public law has long been formally open to other religious groups, and many have applied for and received the status. See *infra* text accompanying notes 226-32. What is new is that a group has applied that meets the formal criteria set out in the Basic Law, but which the government does not consider supportive enough of the state’s democratic basis to merit the status.

117. See Ulrich Scheuner, *Kirche und Staat in der neuen deutschen Entwicklung [Church and State in the New German Development]*, 7 ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT 225, 252-54 (1959/60); Rudolf Smend, *Staat und Kirche nach dem Bonner Grundgesetz [State and Church Under the Bonn Basic Law]*, 1 ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT 4, 7-12 (1952). The Author uses the term “church” here intentionally; these articles speak specifically in

claim is made today in reference to religious instruction in the former East Germany, where many believe that democracy has not fully taken root.¹¹⁸ Popular opinion holds that religion classes in the schools will counter right-wing ideology and violence by promoting values central to peaceful co-existence.¹¹⁹

Pluralism has pushed the system into a corner. While the balance of the Constitution makes clear that these institutions must be opened to other religious groups, the state no longer feels confident that all such groups will promote, or at least refrain from undermining, the state's very basis. This is the specific reason given for excluding Islam and the Jehovah's Witnesses from these institutions.¹²⁰ Yet how may the religiously "neutral" state distinguish among religious groups that seek to participate in these institutions, and when do the criteria infringe on the groups' rights to religious freedom? Brandenburg's refusal to provide traditional religious instruction at all,¹²¹ on the other hand, challenges the starting assumption that such religious instruction serves democracy, and will force the courts to resolve another question: is religious instruction an individual, affirmative right against the state?

A. *Religious Instruction in the German Schools*

The Basic Law, in Article Seven, section three, provides that religion classes are part of the regular curriculum in German

terms of the Catholic and Protestant Churches. For contemporary criticism, see Klaus Obermayer, *Staatskirchenrecht im Wandel [Public Law of Churches in Transformation]*, 20 DIE ÖFFENTLICHE VERWALTUNG 9, 10-11 (1967) (characterizing these authors as promoting an advantaged position for the large churches and discussing the problems that this raises for a state committed to religious neutrality). The resistance that churches and individual Christians offered to Hitler and his government is deeply disputed. See, e.g., Richard John Neuhaus, *Daniel Goldhagen's Holocaust*, 65 FIRST THINGS 36 (1996) (book review). The point here is merely that the experience of National Socialism did not undermine, and perhaps even strengthened, the view that churches and religion help provide the basis for democracy.

118. State elections in the small former East German state of Saxony-Anhalt serve as one example. In the April 1998 elections, the former East German communist party received 20% of the vote and the radical, right-wing "German People's Union" received 13% of the vote, and more than 25% of the votes cast by those under 25. See E.J. Dionne, Jr., *Germany: Anger on the Right*, WASH. POST, May 1, 1998, at A15. Both parties are reasonably hostile to democracy itself, meaning that about one-third of this year's voters in Saxony-Anhalt may have a questionable commitment to this form of government.

119. See Richard Schröder, *Kommt die heidnische Republik? Der Niedergang der Kirchen und der Mißbrauch der Religion [Is the Heathen Republic Coming? The Decline of Churches and the Abuse of Religion]*, DER SPIEGEL, Dec. 22, 1997, at 62.

120. See *infra* text accompanying notes 185-90, 259-63.

121. See *infra* text accompanying notes 140-65.

public schools,¹²² with the exception of secular (*bekennnisfrei*) schools.¹²³ The Basic Law makes student and teacher participation in such classes strictly voluntary, although parents make the decision for their children until they reach the age of fourteen.¹²⁴ Because religious instruction forms part of the regular curriculum (*ordentliches Lehrfach*), it is a required subject—except for students whose parents do not want them to participate—that the state has no choice but to offer on equal footing with other required courses.¹²⁵ Students who do not participate may be required to take another class, and they do not have a free period.¹²⁶ The state pays for the religious instruction even when it is provided by church officials,¹²⁷ the state trains its religion teachers, and religion is a class for which grades can be given that count in determining whether a student advances to the next grade.¹²⁸

Article Seven, section three, of the Basic Law also provides that religious instruction shall be given in accordance with the

122. There is obviously no question as to whether this practice is “constitutional.” Professors Monsma and Soper seriously confuse this issue when they comment that “[a] 1975 case decided by the Constitutional Court dealt directly with the issue of religious instruction in the public schools.” STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, *THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES* 178 (1997). The authors were referring to the *Interdenominational School Cases*, which resolved the constitutionality of public schools based on Christianity. Those cases had virtually nothing to do with formal religious instruction, except that the court used religious instruction to support its conclusion that the Basic Law could not have intended to make schools free of religion.

123. Secular (*bekennnisfrei*) schools, according to a leading commentator, currently play no meaningful role in Germany. Alexander Hollerbach, *Die Religionsunterricht als ordentliches Lehrfach an den öffentlichen und freien Schulen in der Bundesrepublik Deutschland* [*Religious Instruction as a Regular Curriculum in the Public and Free Schools in the Federal Republic of Germany*], in *RELIGIONSUNTERRICHT HEUTE* 212, 214 (A. Biesinger & T. Schreijack eds., 1989).

124. See Link, *Religionsunterricht*, *supra* note 112, at 477. In Bavaria and Saarland, the age is eighteen. See *id.*

125. 74 BVerfGE 244, 251 (1987).

126. Theodor Maunz, *Kommentar zum Grundgesetz, Art. 7* [*Commentary on Article 7 of the Basic Law*] in *GRUNDGESETZ KOMMENTAR* § 7, at 33 (Theodor Maunz et al. eds., 1980).

127. *Id.* The details of how the state reimburses religious groups for the costs of religious instruction provided by religious officials is generally regulated by detailed contracts between religious groups and the states; these contracts also regulate other details of religious instruction in the states. For a detailed look at how the states pay for religious instruction by religious officials, particularly in the somewhat unusual case of Baden-Württemberg, see Alexander Hollerbach & Christoph Gramm, *Staatliche Ersatzleistung für den evangelischen Religionsunterricht* [*Public Substitute Courses for Protestant Religious Instruction*], 36 *ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT* 17 (1991).

128. 42 BVerfGE 346 (1976).

tenets of the applicable religious group.¹²⁹ Although religious instruction is understood as a responsibility and matter of the state,¹³⁰ this language in Article Seven gives religious groups the right to determine the goal and content of their religion classes.¹³¹ Students are accordingly divided into separate classes for religious instruction according to their faith, and the instruction is not limited to history, culture, or general morals and ethics.¹³² The Federal Constitutional Court has instead described the content of the courses as confessionally-bound education, which teaches religion as the "truth."¹³³

The states—with the exceptions of Bremen, Berlin and Brandenburg, discussed below—have arrived at a variety of arrangements for providing religious instruction as a regular subject of instruction in the public schools, while ensuring that instruction comports with the tenets of the relevant religious group.¹³⁴ For example, those who teach religion in the public schools are either state teachers selected or approved by the religious group in question, or religious officials themselves. In either case, teachers do not give religious instruction without approval of both school officials and the religious group.¹³⁵

129. Religious instruction "wird . . . in übereinstimmung mit den Lehren und Grundsätzen der betreffenden Kirche oder Religionsgemeinschaft erteilt."

130. 74 BVerfGE at 251.

131. *Id.*

132. *Id.*

133. *Id.* There is even an argument that such instruction *must* be confessional. As the Constitutional Court noted, the framers of both the Weimar Constitution and the Basic Law assumed that students would attend religious instruction in their own faith. The Court was confronted with a complaint by a student who wanted to attend classes in a different faith, with the permission of both her parents and the religious group providing the instruction. The school objected. The Court reasoned that as long as religious instruction did not lose its unique character as confessional instruction, students of other faiths could be allowed to participate at the discretion of the religious group, not the school. The Court left unclear under what circumstances religious instruction would lose its confessional nature, and what exactly would follow if it did.

134. For representative state laws, see Erstes Gesetz zur Ordnung des Schulwesens im Lande Nordrhein-Westfalen [First Law for Organization of the School System in the State of North Rhine-Westphalia] § 31(1)-(2), *reprinted in* AXEL FRHR. VON CAMPENHAUSEN, III DEUTSCHES SCHULRECHT § 810, at 7 (1998); Gesetz zur Ordnung des Schulwesens im Saarland [Law on the Organization of the School System in Saarland] § 11 (1989), *reprinted in* III AXEL FRHR. VON CAMPENHAUSEN, § 1010, at 11; Schulgesetz für Freistaat Sachsen [School Law for the Free State of Saxony] §§ 18-20.

135. *See, e.g.,* Schulgesetz für Baden Württemberg [School Law for Baden-Württemberg] § 97, *reprinted in* GESETZE DES LANDES BADEN-WÜRTEMBERG (1998) (the religious groups decide on the qualifications for religion teachers. For religion teachers provided by the church, the state and teachers decide together regarding teachers' education and proof of suitability to teach); First Law on the Organization of the School System in the State of North Rhine-Westphalia, *supra*

Similarly, the curriculum and books are either selected by the state with the approval of the applicable religious group, by the religious group itself, or by the religious group and school officials together.¹³⁶ To the extent that the religious groups themselves do not teach the classes, some states explicitly provide that religious representatives have the right to visit classes or otherwise monitor the instruction to ensure that it is consistent with the religious principles of the group in question.¹³⁷

School officials, on the other hand, have the right to ensure that religious instruction generally conforms to school administration and educational goals. School authorities may, for example, ensure that discipline is maintained in religion classes, require religious officials who teach in the public schools to attend parent teacher conferences, and require that religious instructors abide by the generally applicable principles when giving grades.¹³⁸ Some states provide alternative, mandatory instruction in "ethics" or philosophy for students who do not participate in religion classes, a practice that has come under increasing attack, but which was recently upheld by an administrative court in Baden-Württemberg.¹³⁹

1. Religious Instruction as a "Right." The Case from Brandenburg

Traditionally, disputes about religious instruction involved issues like grading, the confessional composition of religion

note 134, § 32(1)-(5) (similar language); School Law for the Free State of Saxony § 18(2)-(3) (religion teachers need approval of religious group); Niedersächsisches Schulgesetz [School Law of Lower Saxony] § 106, *reprinted in* III AXEL FRHR. VON CAMPENHAUSEN § 710.

136. In North Rhine-Westphalia, for example, the curriculum and books are selected with the agreement of the church or religious group. First Law for Organization of the School System in the State of North Rhine-Westphalia § 33(2), *supra* note 134, § 910, at 8. *See also* Verfassung für Rheinland-Pfalz [Constitution for Rhineland-Palatinate], Art. 34, *reprinted in* III AXEL FRHR. VON CAMPENHAUSEN, *supra* note 134, § 900, at 2-3. In Saarland, curriculum and books need the approval of the state. Law on the Organization of the School System in Saarland § 12, *supra* note 134, § 1010, at 11.

137. Such visits must be coordinated with school officials. *See, e.g.*, School Law of Lower Saxony § 106, *reprinted in* III AXEL FRHR. VON CAMPENHAUSEN, *supra* note 134, § 710, at 49; First Law for Organization of the School System in the State of North Rhine-Westphalia § 33(4), *supra* note 134, § 1010, at 11.

138. *See, e.g.*, WILHELM HOLFELDER & WOLFGANG BOSSE, SÄCHSISCHES SCHULGESETZ: HANDKOMMENTAR [SCHOOL LAW OF SAXONY: WITH COMMENTARY] 54-55 (2d ed. 1992).

139. Administrative Court for Freiburg, July 1, 1997. For strong criticism, see Johann Bader, *Zur Verfassungsmässigkeit des obligatorischen Ethikunterrichts* [On the Constitutionality of Compulsory Ethics Courses], 17 NVwZ 256 (1998) (arguing that obligatory alternative classes coerce students into taking religion classes, especially if alternative classes are not academically comparable).

classes, and whether school authorities disadvantaged religious instruction in drawing-up the school calendar.¹⁴⁰ By flat-out refusing to provide religious instruction as envisioned by Article Seven, Brandenburg has pushed a new issue to the fore: is religious instruction a “right” of students, parents, and religious groups?

Brandenburg does not provide religious instruction as an “ordinary subject,” but instead offers a very controversial, required course on “Lifestyles, Ethics, and Religion” (LER).¹⁴¹ LER teachers give information about religion, but not “in accordance with the tenets of the applicable religious groups,” as Article Seven provides.¹⁴² In the early 1990s, just after the two Germanies united, many Protestant leaders in the East rejected religious instruction in the schools, in no small part because they distrusted the close proximity to the state that such instruction entails.¹⁴³ However, by the mid-1990s, both the Protestant and Catholic churches filed suit, claiming that Brandenburg must provide religious instruction that conforms with Article Seven.¹⁴⁴ A faction in parliament, the Christian Democratic Union, has also filed suit challenging Brandenburg’s failure to provide religious instruction as inconsistent with the Basic Law, as have Catholic and Protestant parents and students.¹⁴⁵

140. Koriath, *supra* note 12, at 1042.

141. 141 Brandenburgisches Schulgesetz [School Law of Brandenburg] § 11(2), (4), *reprinted in* MARTIN W. RAMB, *DAS VERHÄLTNIS VON KIRCHE UND STAAT NACH DER DEUTSCHEN WIEDERVEREINIGUNG IN DER KRISE? [THE RELATIONSHIP BETWEEN CHURCH AND STATE AFTER GERMAN REUNIFICATION IN CRISIS?]* 211-12 (1998).

142. See *supra* note 133 and text accompanying notes 129-33.

143. Jörg Winter, *Zur Anwendung des Art. 7 III GG in den neuen Länder der Bundesrepublik Deutschland [On the Application of Article 7 III of the Basic Law in the New States of the Federal Republic of Germany]*, 10 NVWZ 753 (1991). East German church leaders were instrumental in bringing about the “velvet revolution,” but the East German church had been thoroughly infiltrated by members of the secret police, a point that caused considerable controversy within the church, especially after the secret police files were opened and the extent of the infiltration became clear. JOHN P. BURGESS, *THE EAST GERMAN CHURCH AND THE END OF COMMUNISM* 112-21 (1997).

144. Heinrich de Wall, *Zum Verfassungsstreit um den Religionsunterricht in Brandenburg [On the Constitutional Dispute over Religious Instruction in Brandenburg]*, 42 ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT 353, 363-64 (1997). The churches not only seek to force Brandenburg to include religious instruction that conforms with Article Seven, but also to force Brandenburg to stop teaching LER at all. LER, they argue, violates the state’s obligation of neutrality toward religion by presenting churches and religion in a hostile and negative way. *Id.* at 354-58. Critics note that although the class includes information about Rosa Luxemburg, Mahatma Gandhi, and Nelson Mandela, it does not mention Martin Luther, barely refers to Jesus Christ, and includes units on destructive religious movements in the past and prejudices in religions. *Id.* at 355.

145. *Id.*

Brandenburg argues that it need not provide religious instruction largely by virtue of Article 141 of the Basic Law, which makes Article 7(3) (providing for religious instruction in the public schools) "inapplicable in states that had other laws in place on January, 1, 1949."¹⁴⁶ The Parliamentary Council adopted Article 141 in order to exempt Bremen, where the public schools had never included religious instruction, from the relevant requirements of Article Seven, and it is commonly understood to also include Berlin.¹⁴⁷ Brandenburg argues that it comes within this exception because, as of January 1, 1949, its territorial predecessor, the Province of Mark Brandenburg (with exactly the territorial boundaries as the current state of Brandenburg) had "other state laws in place."¹⁴⁸

Legal commentators overwhelmingly reject this claim, largely on the grounds that Brandenburg is not a "state" within the meaning of Article 141 because it was not a member state of the Federal Republic of Germany on January 1, 1949.¹⁴⁹ In addition, commentators argue that an "unwritten" requirement of Article 141 renders it applicable only to those states that have an uninterrupted history as part of the Federal Republic.¹⁵⁰

For its part, Brandenburg maintains that the separation of students by confession in traditional religion classes is no longer justified, particularly in courses about the important questions of life and human cooperation.¹⁵¹ In other words, the state of Brandenburg has different ideas about how to secure the basis of the democracy, illustrating that forty years of communist rule undercut, at least to some degree, the assumptions that grounded Article 7(3)(i) of the Basic Law.¹⁵² Indeed, the state specifically

146. GG art. 7(3).

147. See Link, *Religionsunterricht*, *supra* note 112, at 443-44.

148. Stefan Mückl, *Staatskirchenrechtliche Regelungen zum Religionsunterricht* [*Regulation of Religious Instruction under the Public Law of Churches*], 122 ARCHIV DES ÖFFENTLICHEN RECHTS 513, 544-45 (1997).

149. *Id.* at 544-45; de Wall, *supra* note 144, at 363-64.

150. AXEL FRHR. VON CAMPENHAUSEN, 14 DAS BONNER GRUNDGESETZ [THE BONN BASIC LAW], Artikel 136 bis 146, 304-05 (3d ed. 1991).

151. Paper circulated by the Brandenburg Ministry for Education, Youth, and Sport (Oct. 15, 1991), *reprinted in* RAMB, *supra* note 141, at 115-16. The other new German states have not made this argument, but have instead incorporated the language of Article Seven governing religious instruction into their own state constitutions. CONSTITUTION OF THE STATE OF SAXONY, art. 105; CONSTITUTION OF THE STATE OF SAXONY-ANHALT, art. 27; CONSTITUTION OF THE STATE OF THÜRINGEN, art. 25, *reprinted in* HANS V. MANGOLDT, DIE VERFASSUNGEN DER NEUEN BUNDESLÄNDER [THE CONSTITUTIONS OF THE NEW FEDERAL STATES] 194-96 (1993). The Constitution of Mecklenburg-Vorpommern incorporates the rights protected by the Basic Law and state law explicitly provides for religious instruction. RAMB, *supra* note 141, at 101-02.

152. See GG art. 7(3)(i).

argues that because its people are overwhelmingly without religious affiliation, Article 7(3)(i) cannot apply to it as it does to other states.¹⁵³ The issue, many have commented, has become a symbol of east German self-determination,¹⁵⁴ all the more important because German "reunification" has largely meant the importation of west German institutions into the east.

Although resolution of the case may depend in large part on the history and purpose of Article 141, it also raises questions about exactly what sort of "right" is at issue. Traditionally, German commentators have understood religious instruction as an "institutional guarantee" of the Basic Law,¹⁵⁵ although it appears in the "Basic Rights" section of the Basic Law. An "institutional guarantee" generally means that the Basic Law protects the institution itself, with the details regulated by lawmakers.¹⁵⁶ This requires the state to provide the institution what it needs to ensure that it thrives.¹⁵⁷ As an "institutional guarantee," however, religious instruction has an unclear status as an individual right. Until the 1980s, conventional wisdom held that parents and students, and perhaps even religious groups themselves, had no enforceable rights to demand religious instruction in the schools.¹⁵⁸ This understanding of an institutional guarantee does not include a personal right to the institution itself, but leaves open the possibility of certain rights within the institution, such as the right to have the instruction conform to the tenets of the applicable religious groups, or the right to have children attend religious instruction in their confession, if such instruction is given.¹⁵⁹ Historically, this highly confusing theorizing mattered little: the churches provided religious instruction in the public schools, and no questions arose as to what would happen if they did not.¹⁶⁰

153. Some commentators agree. Ludwig Renck, *Zur grundrechtlichen Bedeutung von Art. 7 II GG* [On the Constitutional Significance of Article 7 III of the Basic Law], NVwZ 1171-72 (1992); Arnd Uhle, *Das brandenburgische Lehrfach Lebensgestaltung-Ethik-Religionskunde* [Brandenburg's Required Course on Lifestyle, Ethics and Religion], 2 KIRCHE UND RECHT 25 (1996). Most do not. See, e.g., Mückl, *supra* note 148, at 543-44.

154. RAMB, *supra* note 141, at 120-21.

155. Alexander Hollerbach, *Freiheit kirchlichen Wirkens* [Freedom of Church Work], in 6 HANDBUCH DES STAATRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 595, 614 (Josef Isensee & Paul Kirchhof eds., 1989) [hereinafter *Church Work*].

156. Carl Schmitt coined the term in reference to certain protections afforded by the Weimar Constitution. CARL SCHMITT, VERFASSUNGSLEHRE [CONSTITUTIONAL DOCTRINE] 170 (1928).

157. *Id.*

158. Koriath, *supra* note 12, at 1045.

159. *Id.*; see also Hollerbach, *Church Work*, *supra* note 155, at 614.

160. Koriath, *supra* note 12, at 1045.

In response to reunification generally, and specifically Brandenburg's refusal to provide religious instruction, commentators increasingly argue that not only religious groups, but also individuals, have a "right" to religious instruction.¹⁶¹ Some still argue that individuals have no such right because religious instruction depends on a willing religious group; if the religious group refuses to participate, the state is not permitted to substitute its own religion classes.¹⁶² Others conclude that the required participation of the churches does not prevent parents and students from having individual rights to such instruction.¹⁶³ Most agree that religious groups have either a right to religious instruction,¹⁶⁴ or, phrased more narrowly, to a good faith offer by the state to include religious instruction in the schools in accordance with the tenets of their faith.¹⁶⁵

2. State Control over Content: Islamic Religious Instruction

The problem of characterizing religious instruction as a "right" arises again when the state seeks to exclude certain groups from providing such instruction, based on the content of the instruction. Although this issue is not currently before the courts, to the Author's knowledge, it has generated significant controversy and is closely related to the case from Brandenburg, meriting its inclusion in this Article. In Brandenburg, where there is no longer any consensus on how religious instruction serves democratic values, proponents of religious instruction increasingly defend the institution as an individual right.¹⁶⁶ Claims for inclusion by minority groups have, however, pushed the institution in the other direction.

Defending religious instruction as an affirmative, individual right, suggests that the state's control over the instruction conflicts with those religious freedoms. Thus, when it comes to Islamic religious instruction, commentators focus on the interests of the state—not individual parents or religious groups—as the basis for the institution.¹⁶⁷ The more that the legitimacy of religious instruction is derived from the service it provides to the state, the more clearly it follows that the state should have some

161. Winter, *supra* note 143, at 754; Mückl, *supra* note 148, at 521-22; de Wall, *supra* note 144, at 358-66.

162. Koriath, *supra* note 12, at 1045-46; Renck, *supra* note 153, at 1171.

163. de Wall, *supra* note 145, at 363-64; Mückl, *supra* note 149, at 521-22.

164. Mückl, *supra* note 148, at 521.

165. Koriath, *supra* note 12, at 1046.

166. This point is particularly clear in de Wall, *supra* note 144, at 371.

167. Koriath, *supra* note 12, at 1047.

control over ensuring that participating groups serve this purpose.

State laws generally make no mention of which specific religious groups may provide religious instruction.¹⁶⁸ Instead, many states premise religious instruction on the presence of a minimum number of students: Baden-Württemberg law states, for example, that such instruction is to be provided for "a religious minority of at least eight students."¹⁶⁹ For groups of less than eight, the schools make rooms available for religious instruction at no cost.¹⁷⁰ In practice, the Catholic and Protestant churches provide religious instruction in all the states to which Article Seven applies; it was with these churches in mind that Article Seven was drafted.¹⁷¹

The issue of who may teach religion in the schools has been most prominent with regard to Islam.¹⁷² About ten percent of all school children in Germany are Muslim and information about Islam is provided in one form or another by the schools in most states.¹⁷³ For example, many states provide special instruction in Turkish for Turkish students.¹⁷⁴ In North Rhine-Westphalia, Hamburg, Hesse, Lower Saxony, Rhineland-Palatinate, and Bavaria, Turkish teachers (employed by the state) give information about Islamic religious beliefs as part of this instruction.¹⁷⁵ However, there is generally no formal participation

168. See, e.g., School Law of Lower Saxony, *supra* note 135, § 104; First Law on the Organization of the School System in the State of North Rhine-Westphalia, *supra* note 134, § 35; School Law for the Free State of Saxony, *supra* note 134, § 18.

169. School Law for Baden-Württemberg, *supra* note 135, § 96(3), reprinted in GESETZE DES LANDES BADEN-WÜRTTEMBERG § 170, at 46 (1998); see also School Law of Lower Saxony § 104(1), *supra* note 134, § 710, at 49 (religious instruction is to be provided for minorities of at least twelve students at one school).

170. School Law for Baden-Württemberg § 96(4), *supra* note 135, §§ 103, 170.

171. Link, *Religionsunterricht*, *supra* note 112, at 500.

172. It is interesting that the issue of which religious groups may give religious instruction has generated no published case law to the knowledge of this Author. It seems that many minority religious groups do not seek to provide religious instruction in the public schools, perhaps for a variety of reasons. In Berlin, for example, the Catholic and Protestant churches and the Humanistic Union provide city-wide instruction in the schools during the time that Berlin makes space available for such classes. Jewish groups do not teach religion in the public schools, but they do teach religion in their private schools at state expense. Other groups have sought and gained access to schools to teach religion, but then have chosen not to do so because so few students wanted to participate. Interview with Wolf-Dietrich Patermann, Director of Division VI, Berlin State Chancellery, in Berlin (Feb. 11, 1998).

173. Koriath, *supra* note 12, at 1041-42 n.6 (1997).

174. *Id.* at 1041-42 n.6

175. *Id.*

by Islamic religious groups in the Turkish language classes, and the classes are limited to providing information.¹⁷⁶ This makes the arrangement quite different than the standard religious instruction, which is given by, or under the supervision of, religious representatives, who may teach religion as the "truth."¹⁷⁷ Some public schools in Bavaria give information about Islam in the course of regular instruction, in German but presumably directed especially at Turkish students.¹⁷⁸ In some parts of Baden-Württemberg, Saarland, Schleswig-Holstein, and Berlin, religious instruction in Islam is possible in the course of special Turkish language instruction provided by the diplomatic representatives of Turkey.¹⁷⁹

Although most states seem willing in theory to permit Islamic instruction on equal footing with Christian classes, two reasons are universally given to explain why they do not. First, many argue that Islam lacks the organizational structure necessary to participate in Germany's system of religious instruction.¹⁸⁰ Islam is a decentralized religion, and some argue it is too decentralized to satisfy the requirements of "religious community" in Article Seven, which, this argument goes, includes a better-developed organization of people with common religious beliefs.¹⁸¹ Similarly, some say that religious "tenets" or "principles" are only possible when the faith has a fixed content which, in turn, requires continuity and organization that Islam in Germany is said to lack.¹⁸² Moreover, as the discussion above made clear, states have complicated administrative procedures governing religious instruction.¹⁸³ For example, cooperation in selecting books and teachers presupposes that someone is in the position to "speak for" and bind the religious community as a whole.¹⁸⁴

The second claim is that permitting Islamic instruction in the schools under the control of Islamic leaders could open the door

176. Wilhelm Rees, *Religionsunterricht in der Schule: Rechtliche Grundlagen und neue Fragenstellungen aus katholischer Sicht* [Religious Instruction in Schools: Legal Foundations and Newer Questions from a Catholic Point of View], 2 KIRCHE UND RECHT 99, 109 (1996).

177. See *supra* text accompanying notes 133-34.

178. Koriath, *supra* note 12, at 1042 n.6.

179. *Id.*

180. ECKHARD KLÜGEL, NIEDERSÄCHSISCHES SCHULGESETZ: HANDKOMMENTAR [SCHOOL LAW OF LOWER SAXONY: WITH COMMENTARY] 300 n.4 (1991); Hollerbach, *Church Work*, *supra* note 155, at 595; Rees, *supra* note 176, at 110-11.

181. Joseph Listl, *The Development of Civil Ecclesiastic Law in Germany 1994/1995*, EUR. J. FOR CHURCH ST. RES. 13, 16-17 (1995).

182. Koriath, *supra* note 12, at 1047. Islam may be developing more organizational structure in Germany. See MONSMA & SOPER, *supra* note 122, at 180; Rees, *supra* note 176, at 111 n.52.

183. See *supra* text accompanying notes 135-36.

184. Hollerbach, *Church Work*, *supra* note 155, at 617.

to religion classes that counter the values advanced by the federal and state constitutions.¹⁸⁵ Here, commentators point specifically to the position of women in the Koran, polygamy,¹⁸⁶ parts of the punishment system in the Koran, the lack of freedom of faith, and the lack of tolerance, or advocacy of violence, toward others.¹⁸⁷ The extent to which Islamic religious instruction actually presents such dangers is disputed.¹⁸⁸ Often, however, the states themselves push for religious instruction as a way of integrating Muslim students into German society, and even as way of discouraging attendance at private Koran schools, which officials view as "extremist."¹⁸⁹ Not surprisingly, some Islamic leaders are suspicious of religious instruction under state auspices.¹⁹⁰

A similar issue arose in West Berlin during the 1980s. Although Berlin does not have formal religious instruction, it does make classrooms available to religious groups for this purpose, albeit without providing any school oversight or involvement.¹⁹¹ Students who do not participate have a free period.¹⁹² School officials feared that proposed Protestant instruction leaned too heavily toward "Liberation Theology" and Marxism.¹⁹³ Berlin sought to distinguish between what the state must permit outside of the schools, which clearly included the right to teach Marxist views, and what the state must permit inside the schools, which Berlin argued did not include religion classes that taught Marxist views.¹⁹⁴ One proposal was to make religious instruction a regular subject of instruction, as in the other German states, thus bringing the classes within the control of the state, and (Berlin hoped) giving the state more power over their content.¹⁹⁵

185. Mückl, *supra* note 148, at 553.

186. The United States Supreme Court also made this point in 1878 when it upheld the conviction of a Mormon under a federal law banning polygamy and reasoned that monogamy was more consistent with democracy than polygamy. *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

187. Link, *Religionsunterricht*, *supra* note 112, at 502; Rees, *supra* note 176, at 111.

188. Mückl, *supra* note 148, at 553.

189. Koriath, *supra* note 12, at 1042.

190. *Id.*

191. GERHARD EISELT & WOLFGANG HEINRICH, GRUNDRIß DES SCHULRECHTS IN BERLIN [OUTLINE OF THE SCHOOL LAW IN BERLIN] 206 (3d ed. 1990).

192. *Id.*

193. *Id.* at 209, 215-18 n. 32. School officials claimed that the proposed instruction ran counter to values such as peace, freedom, the rule of law, and family values, that it presented East Germany in a positive light and West Germany in an overwhelmingly negative light, and that it was really an attempt at political indoctrination under the guise of religious instruction. The syllabus created conflict within the church and was rewritten. *Id.* at 217-18 n.32.

194. *Id.*

195. *Id.* at 216.

The conflicts around Islamic religious instruction and Protestant instruction deemed too close to Marxism, highlight the problems that accompany the state's use of private religious institutions for its own ends, particularly the reinforcement of "values" considered important to the success of democracy. Although religious groups are free to eschew participation in religious instruction entirely and are given a large measure of freedom in determining the content of the courses, the distinctions that the state seeks to draw among the groups are potentially in conflict with the characterization of the institution as a personal religious right, and the Basic Law's general protection of religious freedom. The American analogy is a public program that has as its goal the promotion of democracy, and distinguishes among religious groups on this basis.¹⁹⁶ What are the permissible grounds for drawing such distinctions? This remains unclear for us, as well as for Germany.

B. German Corporate Bodies under Public Law

Awarding to religious groups status as corporate bodies under public law raises many of the same issues. A 1997 decision by the Federal Administrative Court concluded that Berlin properly denied the status to a group of Jehovah's Witnesses.¹⁹⁷ Its reasoning is widely seen as a preview of how the courts will resolve claims by Islamic groups for status as corporate bodies under public law.¹⁹⁸ The lower administrative courts held that Berlin was required to award the status to the Jehovah's Witnesses,¹⁹⁹ a conclusion that has the support of at least one very influential commentator.²⁰⁰ The case now goes to

196. This differs from the German cases in that it involves a government benefit or privilege, while religious instruction, as discussed in this section, is at least arguably an affirmative "right" against the government.

197. Decision of the Federal Administrative Court, June 26, 1997, reprinted in 50 NJW 2396 (1997).

198. Gregor Thüsing, *Kirchenautonomie und Staatsloyalität* [Church Autonomy and Loyalty to the State], 51 DIE ÖFFENTLICHE VERWALTUNG 25 (1998). In 1994 two Muslim organizations applied for the status in North Rhine-Westphalia. Stefan Mückel, *Muslimische Gemeinschaften als Körperschaften des öffentlichen Rechts* [Muslim Communities as Corporate Bodies Under Public Law], 48 DIE ÖFFENTLICHE VERWALTUNG 311 (1995). Their applications remained unresolved as of early 1998. See Thüsing, *supra*, at 25.

199. Decision of Administrative Court for Berlin, Oct. 25, 1993, reprinted in 13 NVwZ 609 (1994); Decision of Administrative Court of Appeals for Berlin, Dec. 14, 1995, reprinted in 15 NVwZ 478 (1996).

200. Hermann Weber, *Körperschaftstatus für die Religionsgemeinschaft der Zeugen Jehovas in Deutschland?* [Corporate Body Status for the Religious Community of the Jehovah's Witnesses in Germany?], 41 ZEITSCHRIFT FÜR

the Federal Constitutional Court, and despite some acclaim for the decision of the Federal Administrative Court,²⁰¹ it is clear that the Constitutional Court could reach the opposite conclusion.²⁰²

1. Meaning of the Status "Corporate Body under Public Law"

The history and significance of the status "corporate body under public law," as well as what entitlements it brings, are murky at best.²⁰³ Indeed, Germans call it a "somewhat puzzling honorary title"²⁰⁴ that "confuses more than it clarifies."²⁰⁵ In general, the status carries with it certain privileges, including two constitutionally protected rights: the ability to impose taxes on church members through the state,²⁰⁶ and freedom from bankruptcy laws.²⁰⁷ Other privileges include that of having officials that are "public" (although the church pays their salary) and who are thus exempt from labor and social security laws;²⁰⁸ the power to ground new organizations that also have a special legal status, such as religious academies;²⁰⁹ the power to publicly dedicate property and thus bring it within the laws generally protecting public property;²¹⁰ freedom from many taxes and fees;²¹¹ special consideration in construction laws;²¹² representation in certain state organizations such as those that control radio and television programming;²¹³ protection under

EVANGELISCHES KIRCHENRECHT 172, 173-75 (1996) [hereinafter *Corporate Body Status*].

201. Ralf B. Abel, *Zeugen Jehovas keine Körperschaft des öffentlichen Rechts* [No Corporate Body Status Under Public Law for the Jehovah's Witnesses], 50 NJW 2370 (1997); Thüsing, *supra* note 198, at 29.

202. Thüsing, *supra* note 198, at 29.

203. The drafters of the Weimar Constitution disagreed at length about the meaning and significance of this institution before deciding to explicitly protect it. HELD, *supra* note 114, at 21-25. The history of the term and the institution have been the subject of long-standing disagreement. ENDRÓS, *supra* note 105, at 9-12, 42-46.

204. Smend, *supra* note 117, at 9.

205. AXEL FRHR. VON CAMPENHAUSEN, THE BONN BASIC LAW, *supra* note 150, at 167.

206. WRV art. 137(6).

207. 66 BVerfGE 1 (1983).

208. AXEL FRHR. VON CAMPENHAUSEN, THE BONN BASIC LAW, *supra* note 150, at 173.

209. *Id.*

210. See Kirchhof, *supra* note 114, at 672.

211. AXEL FRHR. VON CAMPENHAUSEN, THE BONN BASIC LAW, *supra* note 150, at 188-89.

212. *Id.*

213. *Id.*; see also PETER VON TILING, DIE MITWIRKUNG DER KIRCHEN IM STAATLICHEN BEREICH [THE INVOLVEMENT OF CHURCHES IN THE PUBLIC SPHERE] 39-43 (1968).

state criminal law through inclusion in the definitions of church officials, church titles, and official clothing;²¹⁴ and the power to assume certain public administrative functions, such as operating cemeteries.²¹⁵

The privileges are thus a mixture of those relatively familiar to the American reader, such as tax exempt status, and those with no American counterpart, such as the right to representation in certain areas of local government. According to many, the most important benefit associated with the status is the increase in respect that comes through recognition by the state, which makes it easier, for example, for recognized groups to obtain credit from banks.²¹⁶ Many of the entitlements have little or no practical relevance for most religious groups, and having such status does not obligate a group to take advantage of the privileges it offers.²¹⁷ Small religious groups often eschew, for example, even the power to collect taxes,²¹⁸ a power that even some within the two main churches view as less and less of an advantage.²¹⁹

The status does not put religious groups on par with other public corporations such as universities, which are organized and controlled by the state.²²⁰ Religious groups remain under their own control, and the status as corporate bodies under public law is understood to enhance their independence and autonomy.²²¹ As discussed above, commentators defend the status as a recognition of the role religious groups play in collective life and community,²²² and as means by which the government promotes institutions that permit people to develop and exercise their religious views and freedoms.²²³ The hallmarks of groups that receive the status include their "care for the collective interests in public life" and their contribution to the "culture in which political community is rooted."²²⁴ Like religious instruction in the schools, this status and the privileges it brings assists religious groups in their contributions to public life.

214. See AXEL FRHR. VON CAMPENHAUSEN, *THE BONN BASIC LAW*, *supra* note 150, at 189.

215. See HELD, *supra* note 114, at 97.

216. Interview with Rheinholdt Kear, Brandenburg Ministry for Science, Research and Churches, in Potsdam (Jan. 20, 1998).

217. HELD, *supra* note 114, at 53-54, 56-57, 62.

218. *Id.* at 53-54.

219. See *Dearest Jesus*, *supra* note 5, at 57; Interview with Patermann, *supra* note 172.

220. See HELD, *supra* note 114, at 27, 32-37.

221. 53 BVerfGE 366, 400 (1980).

222. See Hollerbach, *Public Law of Churches*, *supra* note 12, at 540.

223. See HELD, *supra* note 114, at 42.

224. Kirchhof, *supra* note 114, at 664-65.

2. Standards for Conferring the Status

The Basic Law incorporates Article 137 of the Weimar Constitution, which provides in section three that "religious bodies shall remain corporate bodies under public law insofar as they have been in the past. Other religious bodies shall be granted like rights upon application, if the constitution and the number of their members offer assurance of their permanency."²²⁵

Religious groups that were corporate bodies under the public law as of 1919 retained this status under the Weimar Constitution, and those that had it as of 1949 continue to enjoy it under the Basic Law.²²⁶ For example, Prussia awarded the status in 1875 to the "Old Catholic Church," and this status still applies in the many states that now comprise what was Prussia, including Berlin, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, and Schleswig-Holstein.²²⁷ A variety of Jewish groups were granted the status before 1919, including the "Israelite Religious Community of Baden" (1809), the "Israelite Religious Community of Württemberg" (1912),²²⁸ and the "Israelite Synagogue (Adass Jisroel) of Berlin (1885),²²⁹ but were destroyed during National Socialism.²³⁰ Since 1949, many Jewish groups have been recognized by various states, along with Mormons, Christian Scientists, Seventh Day Adventists, the Salvation Army, and Unitarians.²³¹ Although each state makes the decision to confer the status or not, there is a somewhat formal attempt

225. WRV art. 137(3).

226. See GG art. 140; WRV art. 137.

227. See HELD, *supra* note 114, at 152-55.

228. See *id.* at 149-50 & nn.1-2.

229. Decision of the Administrative Court of Appeals for Berlin, Feb. 22, 1997, *reprinted in* 16 NVwZ 396 (1997).

230. The destruction of Jewish communities through the Holocaust and related emigration has created legal disputes involving the circumstances under which a group loses its status as a corporate body. In the case of Adass Jisroel, the state of Berlin agreed that the group now qualified for the status, but disputed that it had continuing status by virtue of the 1885 conferral by the King of Prussia. Of 30,000 members, only about 1,000 survived the Holocaust, and virtually all of those had left Germany by 1945. Between 1945 and 1986, the Adass Jisroel had no religious community in Berlin. *Id.* at 398. The Administrative Court of Appeals concluded that the 41 years of religious inactivity in Berlin meant that 1986 was a new group, not simply a continuation of the old community, and that it therefore did not have corporation status by virtue of the 1885 award. *Id.* at 399-400. The Federal Administrative Court reversed. Decision of the Federal Administrative Court, Oct. 15, 1997, *reprinted in* 17 NVwZ 156 (1998).

231. See HELD, *supra* note 114, at 149-55.

among the states to take a unified approach to conferring the status.²³²

Until the Jehovah's Witnesses case, the criteria for awarding the status as a corporate body under public law raised few problems for the courts and generated little scholarship.²³³ Only four cases pressed the issue in court after the Basic Law was enacted in 1949, and all of them were resolved by determining whether the groups offered the "assurance of permanency" based on the number of members and organization of the group.²³⁴ In three cases, the religious group lost, but in one the court concluded that the state had erred in denying the status.²³⁵ None generated significant controversy.

3. The Jehovah's Witnesses Case

The case brought by the Jehovah's Witnesses against the state of Berlin raised for the first time serious questions about the criteria by which states award the status as a corporate body under public law. An organization in Germany since 1897, Jehovah's Witnesses were banned during National Socialism, but re-organized as an association in September of 1945 in Magdeburg, in what would become East Germany.²³⁶ The group was banned again in 1950, this time by the East German government, which forbid and made punishable their "every activity."²³⁷ In 1990—after dissolution of the socialist East German government but before reunification with the Federal Republic—East Germany formally "recognized" Jehovah's

232. Hermann Weber, *Die Verleihung der Körperschaftsrechte an Religionsgemeinschaften* [The Granting of Corporate Body Rights to Religious Communities], 34 ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT 337, 341-42 (1989) [hereinafter *Granting Corporate Body Rights*].

233. *Id.* at 340.

234. *Id.* at 342-44. For example, an administrative court in Hannover upheld the decision to deny the status to an independent Lutheran group that had fewer than a hundred members until the selection of a new minister, when the number jumped to 3,000. The group applied for the status just as the minister planned his retirement, and the court agreed with the state of Lower Saxony that the group had not demonstrated that it would survive in its current form. *Id.* at 342.

235. An administrative court in Bavaria concluded in 1982 that the state must award the status to a Baptist group with around 3,500 members. In concluding that the group offered adequate assurances of its permanency, the court relied in part on the international size and importance of the Baptist church, to which the Bavarian group belonged. *Id.* at 343-44.

236. Decision of the Administrative Court of Appeals for Berlin, Dec. 14, 1995, reprinted in 15 NVwZ 478 (1996).

237. *Id.*

Witnesses and lifted the ban on their activities.²³⁸ In 1996 the group reported twenty-nine meeting places and more than eight-thousand members in Berlin.²³⁹ Berlin denied Jehovah's Witnesses status as a corporate body under public law in 1993, a decision reversed by two administrative courts but eventually reinstated by the Federal Administrative Court in July of 1997.²⁴⁰

The Basic Law requires the award of status as a corporate body under public law to religious groups whose "constitution and number of members offer assurance of their permanency."²⁴¹ The "number of members" is measured against the population of the state as a whole, and although commentators mention one-tenth of one percent, there is no "cut-off" figure.²⁴² Similarly, most argue that the group must have survived for more than one generation (about thirty years) but other factors, such as the strength and age of the group in other states and countries, can also play a role.²⁴³ The word "constitution" in this context is widely understood to include an organizational structure that makes it possible for the group to work with the state; it must, for example, have some sort of administrative structure, offer at least a measure of financial stability, and have a regular meeting of members.²⁴⁴ These criteria help the state evaluate whether the group will offer the permanency envisioned by the Basic Law,²⁴⁵ but they also ensure that there are representatives who can speak with some authority for the group in its dealings with the state.²⁴⁶ Berlin does not dispute that Jehovah's Witnesses meet these standards.²⁴⁷

The legal battle centers instead around other requirements for the status not expressly stated in Section 137.²⁴⁸ Courts and commentators unanimously conclude that the structure of the

238. *Id.* at 478-79; see also Weber, *Corporate Body Status*, *supra* note 200, at 173-75.

239. STATISTISCHES LANDESAMT BERLIN, STATISTISCHES JAHRBUCH 1997 [STATISTICAL YEARBOOK 1997] 194 (1997).

240. Decision of Federal Administrative Court, June 26, 1997, *reprinted in* 50 NJW 2396.

241. WRV art. 137(5).

242. Weber, *Granting Corporate Body Rights*, *supra* note 232, at 355.

243. *Id.*

244. See Kirchhof, *supra* note 114, at 651.

245. Decision of Administrative Court of Appeals for Berlin, *reprinted in* 15 NVwZ at 480 (1996).

246. Weber, *Granting Corporate Body Rights*, *supra* note 232, at 351.

247. Decision of the Federal Administrative Court, June 26, 1997, *reprinted in* 50 NJW 2396 (1997).

248. The lower courts rejected the claim that the group had received the status by virtue of its recognition by the transitional East German government in 1990. The Jehovah's Witnesses apparently did not challenge this conclusion when Berlin appealed the case to the Federal Administrative Court.

Basic Law implies a further prerequisite for the status: "rechtstreue" or faithfulness to "law" or "justice."²⁴⁹ Article 9(2) of the Basic Law, which permits the state to ban "associations," including religious organizations whose purposes or activities conflict with criminal laws or are counter to the constitutional order, at minimum means that the state need not confer the status on groups that it may forbid.²⁵⁰ Jehovah's Witnesses did not fall into this category.²⁵¹

Uncontested too, is that, as part of "rechtstreue," the state may demand that the religious groups awarded the status will exercise their administrative powers—in collecting taxes, running cemeteries, or giving assistance to young people with state money, for example—in accordance with applicable laws.²⁵² What exactly this requirement means for an applicant group, however, remains an open question. Berlin argued that Jehovah's Witnesses did not clear this hurdle because the organization allegedly practices a system of "coercion," in part because many of those who "work" for the organization receive little pay and inadequate health insurance and retirement pensions, arguably in violation of the law.²⁵³ In addition, Berlin argued that the group "isolates" children and practices corporal punishment.²⁵⁴ The Federal Administrative Court refused to resolve these issues factually, but suggested that questions of internal church organization and discipline do not generally provide the basis for concluding that the group will not properly exercise its administrative functions.²⁵⁵ The court reasoned that the line between religious freedom and autonomy, on the one hand, and the requirements of the legal order of the state, on the other, was difficult to draw; that religious groups are not required to conform their own organizational structure to that of the democratic state; and that particular points of conflict between the state and a religious community do not provide the grounds for denying the groups status as corporation under public laws.²⁵⁶

249. Christoph Link, *Zeugen Jehovas und Körperschaftstatus [Jehovah's Witnesses and Corporate Body Status]*, 43 ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT 1, 20-23 (1998) (accurately describing this conclusion as uncontested) [hereinafter *Jehovah's Witnesses*]. The term "recht" can mean either "law" or "justice." See CURRIE, *supra* note 90, at 18-20, 117-21.

250. Decision of the Federal Administrative Court, June 26, 1997, *reprinted in* 50 NJW at 2397.

251. *Id.* at 2398.

252. *Id.*

253. Link, *Jehovah's Witnesses*, *supra* note 249, at 39-53.

254. *Id.*

255. Decision of the Federal Administrative Court, *reprinted in* 50 NJW at 2398.

256. *Id.*

Further requirements based on loyalty to the state are contested. Some argue that the only permissible limitations are narrowly construed requirements of loyalty discussed in the preceding two paragraphs. The Basic Law's protection of religious freedom, these commentators argue, prevents the states and the courts from awarding benefits based on their evaluation of the teachings and theological merit of applicant religious groups.²⁵⁷ Others go as far as to argue that the state may consider the "dignity" or the "value" of religious groups in awarding the status.²⁵⁸

The Federal Administrative Court did not directly resolve this dispute, but suggested that it would give "rechtstreue" at least a relatively broad reading when it concluded that Jehovah's Witnesses do not offer the requisite faithfulness to the democratic state because adherents may not vote.²⁵⁹ Corporation status, the court reasoned, assists religious organizations where their "works" or influences correspond to the interests of the state.²⁶⁰ This endeavor demands mutual respect, and the state can expect that an organization that seeks such status will not call the basis of the state itself into question.²⁶¹ Although the court concluded that Jehovah's Witnesses are positively disposed toward the state and its laws, the court's decision turned on its finding that Jehovah's Witnesses reject voting out of principle.²⁶² This, the court reasoned, puts the group in conflict with the act that constitutes democracy itself and that lies at the very heart of the constitution.²⁶³

The last paragraph of the opinion makes short work of the lower court's reasoning that the Basic Law protects, as part of the guarantee of religious freedom, the right not to vote, and that a religiously motivated refusal to vote therefore cannot provide the basis for denying status as a corporate body under public law.²⁶⁴

257. Weber, *Granting Corporate Body Rights*, *supra* note 232, at 357; HELD, *supra* note 114, at 122-24.

258. Axel Frhr. von Campenhausen, *Neue Religionen im Abendland [New Religions in the West]*, 25 ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT 135, 168 (1980).

259. Decision of the Federal Administrative Court, 50 NJW at 2398.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 2398-99.

264. Decision of the Administrative Court of Appeals for Berlin, *reprinted in* 15 NVwZ 481. Professor Weber also reasons that the status could not be denied on these grounds. Weber, *Corporate Body Status*, *supra* note 200, at 216-18 (arguing that a religiously motivated refusal to vote is protected by Article Four and cannot provide the grounds for denying the status and that the state may not evaluate the "quality" of religious groups); *see also* Jörg Müller-Volbehr, *Rechtstreue und Staatsloyalität: Voraussetzung für die Verleihung des*

The Federal Administrative Court responded with an argument familiar to any American observer: status as a corporation under public laws, the Court reasoned, is no "necessary result of religious freedom," but is instead an "advantage conferred by the state."²⁶⁵ Thus the court appeared to draw a clear distinction between "rights" and "privileges," one it has rejected elsewhere,²⁶⁶ to explain why its conclusion did not violate the free exercise rights of the Jehovah's Witnesses. This would present a classic unconstitutional conditions problem, except that it is unclear in what sense status as a corporation under public laws is really a "privilege."²⁶⁷ Furthermore, it is unclear in what sense the conditions imposed go beyond the parameters of the subsidy itself, which, after all, has as its overarching goal the promotion of democracy.²⁶⁸ The language of Article 137(5) suggests that the state *must* award the status to groups that meet the criteria,²⁶⁹ making it something other than what we term a "privilege."²⁷⁰ Instead, there seems to be a conflict between those parts of the constitution that (arguably) make the status dependent on loyalty to the state, those that protect such "disloyalty" as part of religious freedom, and those that guarantee equal treatment of people with different religious beliefs.

C. *The Limits of Private Religious Choice: Democracy as a Funding Goal*

How would we resolve such cases? To some degree the question makes no sense because in Germany the institutions are protected by the Basic Law, while in this country the institutions themselves would be unquestionably unconstitutional, in no

Körperschaftstatus an Religions und Weltanschauungsgemeinschaften? [Faithfulness to Law and Loyalty to the State: Prerequisites for the Granting of Corporate Body Status to Religions and Philosophical Communities?], 50 NJW 3358, 3359 (1997) (criticizing the requirement of loyalty to the state as infringing on the religious liberties of the group, noting the danger that the status will become something that only the state's "favorites" receive and arguing that the question of whether to vote was a religious decision and part of the group's internal structure, which the court recognized need not be democratic).

265. Decision of the Federal Administrative Court, 50 NJW at 2399.

266. See CURRIE, *supra* note 90, 238-40.

267. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (doctrine applies to discretionary benefits, not benefits government is constitutionally obligated to confer).

268. David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 694-97 (1992) (doctrine applies to conditions that exceed scope of the funding).

269. Link, *Jehovah's Witnesses*, *supra* note 249, at 11; Weber, *Corporate Body Status*, *supra* note 200, at 191-93.

270. See WRV art. 137(5).

small part because they single out religious groups for special public treatment, and, in the case of corporation status, they extend a "status" that goes beyond participation in particular government programs. To leave it at that, however, misses what the German cases may offer to the United States, for we also lack a solution to the puzzle of secular funding goals that profoundly influence private religious choices and institutions. Thus, Professor Carter argues on the one hand that the Establishment Clause should not "disable religious groups from active involvement in the programs of the welfare state."²⁷¹ At the same time, he urges that religions (in the Free Exercise context) need a "separate sphere from the sphere of state control,"²⁷² without considering how religious participation in public welfare programs erodes this "separate sphere."²⁷³

Imagine, building on dicta in *Rust v. Sullivan*,²⁷⁴ that the United States government set up an organization to fund "local democracy" in response to right wing violence. The program would promote "democratic values," "non-violent conflict resolution," "equality between men and women," and "racial and religious equality and tolerance." Could religious groups apply for funding just like the Girl Scouts, local youth groups, and the Lions Club? Must the program include religious groups, or must it exclude them, or may it pick and choose among them according to specified criteria? Could it include Unitarian Bible study groups, but exclude comparable Jehovah's Witness groups, because voting is a basic "democratic value?"

The voluntarist approach has forcefully argued that religious groups must be included in public welfare programs on the same terms as secular organizations.²⁷⁵ Inclusion in this situation, however, seems to undermine, if not betray, the private religious choice analysis at the heart of this position: participation means those groups that line up behind a particular version of "democracy" or "equality" get government goodies. Exclusion from the program may create an incentive to secularize, but inclusion creates incentives toward homogenization in religious matters. How do we evaluate these pressures on private religious choice? Moreover, the problem is also not primarily one of

271. CARTER, THE CULTURE OF DISBELIEF, *supra* note 24, at 123.

272. Carter, *The Resurrection?*, *supra* note 47, at 136.

273. Carter argues that religious communities can provide "resistance to state authority," that they are "vital transmitters of values," and concludes, exactly like the Germans, that these functions are "pro-democratic." *Id.* at 136-39.

274. 500 U.S. 173, 194 (1991).

275. See, e.g., Esbeck, *supra* note 47, at 35-41; Laycock, *Underlying Unity*, *supra* note 32, at 70-72; McConnell, *Crossroads*, *supra* note 24, at 183-87.

unconstitutional conditions,²⁷⁶ which more accurately captures the difficulties that arise in excluding religious groups from programs for which they would otherwise qualify²⁷⁷ or those that arise when the government attaches conditions on participation in public programs beyond simply the goals of the program itself.²⁷⁸

This is a strong example of a problem that all government funding poses and that is frequently overlooked in the rush to understand "private" religious choice as the key to the Establishment Clause. The problem lies in the goals of the program itself, in the difficulty in deciding what viewpoints the government may advance, and in how government itself may speak through its funding power,²⁷⁹ and not in the more narrow question of including or excluding religious groups, or in conditions on awarding the funding. As religious groups become more a part of government welfare programs, those who promote private religious choice will either have to suggest far greater limits on government funding generally, conclude that religious groups must at times be excluded, or accept that government may profoundly impact private religious choice through secular funding. Indeed, even "easy" examples pose this problem: funding soup kitchens encourages religious groups to engage in feeding the hungry as opposed to other good works.²⁸⁰ For those who see the provision of such services as integrally connected to religious beliefs, government programs funding certain social services may profoundly influence private religious decisions. The point is not that soup kitchen programs including religious organizations are unconstitutional, but that they, too, may influence private religious choice.

The Supreme Court would evaluate the hypothetical democracy program by considering the "religious" or "sectarian" character of the organization or the speech.²⁸¹ The Establishment

276. This is so because the condition does not "extend beyond the scope of the subsidy itself." Cole, *supra* note 268, at 694-97.

277. Michael W. McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255 (1989).

278. See Paulsen, *A Funny Thing*, *supra* note 24, at 663-717.

279. The problems of government speech and government-funded private speech are probably the most intractable of all those presented by the First Amendment. For discussions of these problems generally, see Cole, *supra* note 268; and Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980).

280. Cf. Bowen v. Kendrick, 487 U.S. 589, 641-42 (1988) (Blackmun, J., dissenting) (reasoning that soup kitchens were an easier case for equal access than issues of teenage sexuality, which are morally and religiously based).

281. Four members of the Court, Justices Stevens, Souter, Breyer and Ginsburg, would probably rely on the sectarian nature of the organization itself, see *Agostini v. Felton*, 51 U.S. 203, 2019-28 (1997) (Souter, J., dissenting), while Justice O'Connor would likely evaluate whether the funded speech itself qualified

Clause would, under this analysis, prohibit funding to “pervasively sectarian” organizations as well as funding for speech that included “religious indoctrination.”²⁸² Both approaches draw the line based on the “religiousness” of the organization or the speech, and would mean that Bible study that also advanced the equality of men and women would not pass constitutional muster. Pluralists ask whether the program has a “public purpose”—which may include the promotion of “morals”²⁸³—and whether the program provides the service(s) for which the government has granted funds.²⁸⁴ However, pluralists would not invalidate a program simply because the group integrated “religious beliefs and practices” into the program, an issue “of no concern to the government.”²⁸⁵

One could argue that the Supreme Court’s result is correct from the perspective of private religious choice because if the program is “more religious” or “more sectarian,” it lies closer to core religious values, increasing its impact on private religious choice. But this argument rests on untenable assumptions about how private religious choice is related to public programs generally. How would we answer the complaints of a religious group whose theology had little to do with gender, race, or violence, but everything to do with performing “good works” in the community? The government’s decision to fund soup kitchens, this group might argue, profoundly influences its choice to provide that particular service, a choice that is, or should be, at base, an uninhibited religious one.

The point of the preceding paragraphs is, in part, that our intuitions tell us that “democracy” programs (as defined in the hypothetical above) are constitutionally far more troubling than soup kitchen programs. Yet, neither the pluralist position, nor even the underlying concerns with private religious choice, fully explain our discomfort. The following discussion posits an explanation for our intuitions based on what Professor Robert Post has called “public discourse” and the goals that it serves in

as “religious indoctrination,” see *Bowen*, 487 U.S. at 623-24 (1989) (O’Connor, J., concurring). A minority of the Court would reason that the neutral criteria themselves insulate the program from invalidity under the Establishment Clause. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 852-53, 858, 862-63 (1995) (Thomas, J., concurring) (suggesting that neutral criteria is enough to satisfy the Establishment Clause).

282. *Bowen*, 487 U.S. at 610-11, 641 (O’Connor, J., concurring).

283. Esbeck, *supra* note 47, at 36-37.

284. *Id.*

285. *Id.* at 36.

"responsive democracy."²⁸⁶ Although Post has not used these terms to specifically explore the scope of the Establishment Clause,²⁸⁷ his discussion of them is helpful in capturing our concern with the hypothetical democracy program.

Public discourse, as Post describes it, is speech protected by the First Amendment in which "many types of life, character, opinion and belief can develop unmolested and unobstructed."²⁸⁸ For its part, responsive democracy is more than a majority-rule, formal democracy; it is a system in which people identify with the majority's decisions, even if those decisions do not correspond to their own preferences. Public discourse serves to transform a formal democracy into a responsive democracy by providing the basis for reconciling individual autonomy and "collective self-determination," or the "general will."²⁸⁹ It does this by presenting the opportunity to engage in critical dialogue with others, or through the "running discussion between majority and minority."²⁹⁰ Those whose individual preferences do not become part of the collective will accept the collective decision as their own because public discourse gave (and gives) them the opportunity to convince the majority it was (or is) wrong.²⁹¹ To legitimize democracy in this way, public discourse must provide the space in which people can transcend and reform the norms of the community in which they live;²⁹² it is a forward-thinking

286. This is the subject of the first part of his book. See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 1-196 (1995) [hereinafter POST, *CONSTITUTIONAL DOMAINS*].

287. Post uses these terms to explain why the First Amendment keeps the government from directly regulating speech through, for example, criminal laws, or private causes of action that limit speech. He notes that the religion clauses generally protect personal autonomy, but without exploring how they do so. See *id.* at 189. Post similarly describes the Establishment Clause as requiring the government to be "neutral" among competing versions of religious community, see Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L. J. 473, 484 (1997), and remarks that the Establishment Clause limits government speech and funding, but again without describing precisely where and how, see Robert C. Post, *Subsidized Speech*, 106 YALE L. J. 151, 182 n.164 (1996) [hereinafter Post, *Subsidized Speech*].

288. See POST, *CONSTITUTIONAL DOMAINS*, *supra* note 286, at 138 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940)). Post takes the term "public discourse" from *Hustler Magazine v. Falwell*, 485 U.S. 46, 54 (1988). See *id.* at 273.

289. See *id.* at 184-89.

290. See *id.* at 185 (quoting HANS KELSON, *GENERAL THEORY OF LAW AND STATE* 287-88 (Anders Wedberg trans., 1961)).

291. *Id.*

292. Limits on public discourse undermine this goal by "excluding those affected from access to the medium of collective self-determination," and by cutting off their participation in the "fundamental democratic project" of reconciling individual and collective will. See *id.* at 273.

place, based on the notion of the self as autonomous, unencumbered, and open to the possibility of communal and personal transformation.²⁹³

Post argues that in the area of government regulation (not what is at issue in this Article),²⁹⁴ the First Amendment limits community norms that are enforced by legal sanction (such as those enforced by libel and blasphemy laws), creating space for public discourse where the community itself can be challenged, criticized, and transformed. Here the power of community to enforce its own norms must be limited to promote public discourse.

The success of public discourse in creating a responsive democracy also, however, depends on community. As Post explains, the "stability" of "responsive democracy" depends on the maintenance of appropriate forms of community life.²⁹⁵ Because community promotes self-determination, engenders the "feeling of participation" that rests "on an identification with the aspirations of a culture that attempts to reconcile differences through deliberative interaction," and enforces rules of "civility and respect" necessary for successful discourse, both public discourse and responsive democracy depend on "healthy forms of community life."²⁹⁶

The success of public discourse and responsive democracy depends on a certain kind of faith. In order to accept the will of the majority, even when it conflicts with one's own preferences, one must believe that public discourse is truly open to views that

293. See *id.* at 188.

294. At issue here is the government's power, through subsidies to private groups, to fund particular goals, such as soup kitchens or better democracy, in part by advancing a particular "message" or speech (e.g., "voting is good") through those groups. Post explores part of this problem in *Subsidized Speech*, where he reasons that the limits on the government's power to control subsidized speech in the domain of public discourse depends on whether the government's actions are characterized as "conduct rules," directly regulating public speech, or "decision rules," guiding internal government operations in order to achieve a particular objective. Post, *Subsidized Speech*, *supra* note 287, at 180. Conduct rules, but not decision rules, must clear the high hurdles imposed on all direct government regulation of speech, including viewpoint neutrality. See *id.* at 180-84. Decision rules are generally only limited by how "the government can organize itself to intervene in public discourse" so as to promote the particular value in question. See *id.* at 181. Post suggests that there are few such limits on decision rules, or on the government's power to "exemplify and advance particular community values." See *id.* at 184-92. The question explored in the above discussion is what limits the Establishment Clause places on this power, and the point is that the answer comes not just from personal autonomy, but also from the tension between democracy and community that Post describes.

295. See POST, CONSTITUTIONAL DOMAINS, *supra* note 286, at 189-90 (footnotes omitted).

296. See *id.* at 192-93.

one seeks to advance. A truly responsive democracy, in which constituents hold as legitimate the outcome of the political process, depends on their sense that the government has not shaped the space of public discourse in advance, or "fixed" the game.

This need for faith helps capture our intuitions about the hypothetical democracy program. Although the government is continually shaping public discourse around prevailing community norms, the difficulty arises when it does so in a way that shakes our faith in public discourse; it is our *perception* that government direction fixes the game that matters. The democracy program threatens public discourse in this way because it seeks to reform individuals before they enter into public debate, rather than just adding its own opinion. While we can counter, perhaps with difficulty, the government's explicit message in public discourse, (e.g., a public service message "Go to the polls and vote, it's the right thing to do"), it is harder to counter deeply embedded private opinions that less obviously spring from, or are shaped by, government influence. The hypothetical democracy program seems to shape public discourse in this way.

Moreover, the democracy program does not just shape individuals (and through them the public discourse), it shapes them around a particular vision of public discourse. The attempt to put some things in the "democracy" box and to keep other things out is easily understood as a way of honing our sensibilities to say that certain things fall beyond the legitimate scope of democratic public discourse. Moving things off the table of public discourse in this way may facilitate or appear to facilitate particular outcomes to the detriment of those with other views; public discourse, as a result, may seem less "fair."

Finally, where the government draws these lines based on race and gender, it intrudes on public discourse where it can least afford to do so. Issues of race and gender seem central to our personal identity; as such they are especially resistant to reconciliation with the collective will. If we think that the government has manipulated people around its vision of gender and race in order to promote a particular national community, the critical ingredient needed to bridge the distance between personal and collective decisions is missing: faith that public discourse truly gives us the opportunity to convince others of our view.

This last point seems to simply lead us back to the issue of private religious choice by suggesting that a program that impacts deeply held personal or private values (the hypothetical democracy program) is more suspect than one that does not (the soup kitchen). What shakes our faith in responsive democracy, however, is related not solely, and perhaps not even largely, to whether individual autonomy is implicated in what the

government does. Instead, faith in public discourse depends on our perception of whether the legitimacy of public discourse is threatened. Aid to soup kitchens may involve political debate, and may also shape individuals' views, including their private religious choices. Still, winners and losers alike understand the result as legitimate, as a decision to fund soup kitchens. The "losers" in the democracy program debate, however, understand the government's funding as making their efforts to be heard in public discourse more difficult, and hence they are less likely to accept the majority's decisions as their own. If some claim that the soup kitchen program is central to their autonomy, we cannot refute that claim as a matter of personal autonomy, but we do say that the government had neither the intent nor the effect of reshaping public discourse.

Germany draws this line differently. It seeks to ensure public discourse by fostering what Post explicitly says community must provide for responsive democracy to work: personal autonomy, the desire to reconcile that autonomy with the collective will, and the "civility and respect" necessary to successfully engage in public discourse.²⁹⁷ We protect autonomy and the integrity of private religious institutions in order to preserve public discourse. Germany, on the other hand, gives the government more latitude to build community and shape public discourse, even if this imposes some limits on private institutions. The point is that in this context our notion of private religious choice is not freestanding, but is instead tied to the success of responsive democracy, precisely the goal that Germany pursues.

Similar issues arise in the discussion of government religious speech below. Government religious speech distorts private religious choice by influencing the listener in favor of the views advanced by the speech, and participation in the creation of government speech gives religious groups the opportunity to compromise and agree on religious speech different from what they would engage in privately. Prohibiting government religious speech, on the other hand, means that the first amendment aggressively *requires* a different sort of collective community building, one that distorts heavily in favor of the secular. The flaws in the private choice analysis are the same here. Without at least some grounding in how the political system should function, "private choice" provides us with little reference point just when the issues become particularly difficult.

297. The similarities to republican political theory are clear. See SANDEL, *supra* note 48, at 5-7, 25-28; Richard H. Fallon, Jr., *What is Republicanism, and is it Worth Reviving?*, 102 HARV. L. REV. 1695, 1700-01, 1715-18 (1989).

V. RELIGIOUS SPEECH BY THE GOVERNMENT

The complicated relationship between private religious choice and government religious speech is the subject of this section. Here the term "government religious speech" means speech by government officials or private speech attributable to the government by virtue of the government's control over the content or setting of the speech, as well as speech that has kept some or all of its religious meaning.²⁹⁸ "Government religious speech" does not include speech solely about religion, such as a history class that includes the Reformation, or a literature class that includes Goethe's *Faust*,²⁹⁹ or speech that has become almost entirely secular in meaning, i.e., the name of the city of "Santa Monica." There is, of course, no clear line between secular and religious speech, and both the German Federal Constitutional Court and the U.S. Supreme Court have embarrassed themselves trying to draw one.³⁰⁰ This difficulty is an important subtext in the discussion that follows, but the discussion begins with a somewhat different question: what is the relationship between private religious choice and the *religious* (as opposed to the secular) aspects of government speech?

A. German Cases

The Constitutional Court has traditionally resolved government religious speech cases almost entirely on what we would term free exercise grounds. The institutions discussed in the foregoing section sharply undercut any argument that the prohibition of a state church in the Basic Law means that government and religion must remain "separate." Both religious instruction and status as a corporate body under public law require close and ongoing cooperation between the state and the religious groups involved, and both are explicitly protected by the

298. This would include, for example, school-initiated Bible readings during school hours, in which students select and read the passages, *see* *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 206-07 (1963), or prayers during a graduation ceremony read and written by a private speaker at the request and under the direction of school officials, *see* *Lee v. Weisman*, 505 U.S. 577 (1992).

299. Such speech is constitutional in both countries. *See* *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 236 (1947) (Jackson, J., concurring); *Schempp*, 374 U.S. at 225; Martin Heckel, *Das Kreuz im öffentlichen Raum. Zum "Kruzifix-Beschluß" des Bundesverfassungsgerichts* [*The Cross in Public Spaces. On the Federal Constitutional Court's "Crucifix Decision"*], 111 DEUTSCHES VERWALTUNGSBLATT 453, 456 (1996).

300. *See* *Lynch v. Donnelly*, 465 U.S. 668, 685-86, 692-93 (O'Connor, J., concurring), 709-13 (Brennan, J., dissenting); *infra* text accompanying notes 352-73.

Basic Law. With the tools of separation largely unavailable to it, the Constitutional Court has relied on the impact of religious speech on personal autonomy to gauge its compatibility with the Basic Law,³⁰¹ at least until the Classroom Crucifix decision in 1995.³⁰²

The reliance on individual autonomy has produced three limitations on government religious speech; all three are of growing significance to the United States, as both the Supreme Court and scholars seek to understand the Establishment Clause not in terms of separation, but in terms of private religious choice. Coercion is the easiest limitation based on personal autonomy, and both countries now face virtually identical problems in defining what exactly falls into this category. Second, some government speech that cannot be termed coercive, but that does favor or endorse religion, violates the Basic Law. In the United States, as in Germany, the courts have had trouble pinpointing exactly how to categorize and evaluate such speech based on personal autonomy.

Finally, the German courts insist that government religious speech can promote religious liberties by giving religion space to unfold in public areas over which the state has a great deal of control, principally the public schools.³⁰³ This is how the Federal Constitutional Court usually justifies government religious speech. It does not rely, in other words, on the state's power over education as a justification for the "religious" elements of religious speech, such as school prayer. It does rely on this justification for religious speech that has a largely secular meaning, but religious speech itself is justified primarily by reference to the liberties of the government's constituents.³⁰⁴

Although this argument sounds unfamiliar, it is advanced in the United States as well.³⁰⁵ In a slightly different form, it is used to both attack the model of separation as inconsistent with the state's obligation to neutrality and to support the proposition that government religious speech should correspond to the actual religious practices of individuals.³⁰⁶ In contrast to arguments made in the United States, however, German courts have reasoned that the political process, which stands in some tension with individual autonomy, determines how religious views get reflected into the public sphere. This tension leads the German courts to look to how the political process *should* function to

301. See generally CURRIE, *supra* note 90, at 249-50.

302. 93 BVerfGE 1.

303. See *infra* text accompanying notes 312-51.

304. See Heckel, *supra* note 299, at 456.

305. See *infra* text accompanying notes 404-16.

306. See *infra* text accompanying notes 86-89, 404-16.

maximize religious autonomy when government speech is at issue. The local nature of constitutional adjudication that this model suggests, and its goal of promoting “compromises” that best correspond to the preferences of everyone is, however, foreign to United States jurisprudence. Before addressing these three limitations, however, the German cases themselves and the conflicts that they have generated are discussed in the following section.

1. Interdenominational School Cases

A trio of 1975 decisions upholding the school systems in Baden-Württemberg, Bavaria and North Rhine-Westphalia illustrate the Constitutional Court’s traditional approach to government religious speech, particularly in the schools.³⁰⁷ In the first two cases, plaintiffs challenged the compulsory public schools as too religious.³⁰⁸ The schools were explicitly based on Christian values, included Christian symbols in the classrooms and school prayer, required that music classes include Christian songs, and had curricula based on Christianity but “open” to other world-views.³⁰⁹ The schools were not “confessional,” that is they were not aligned with one particular Christian tradition, and religious instruction itself was conducted in separate, voluntary classes divided by confession.³¹⁰ The third case involved similar interdenominational schools, but the challenge came from parents who wanted their children to attend public confessional schools, i.e., Catholic or Protestant public schools.³¹¹

The Constitutional Court upheld the school systems in all three states. The court first reasoned that Article 6(2)(1) of the Basic Law,³¹² which gives parents control over the upbringing of their children, does not give parents the right to select the form of the local public school.³¹³ Instead, the court held that the Basic

307. See 41 BVerfGE 29 (1975) *translated and reprinted in part in* DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 467-70 (2d ed. 1997); 41 BVerfGE 65 (1975); 41 BVerfGE 88 (Interdenominational School Cases).

308. 41 BVerfGE 29; 41 BVerfGE 65.

309. See 41 BVerfGE at 38-39.

310. See *id.* at 41.

311. Historically, many German states had public schools divided by confession. In these cases, consolidation for the purpose of increasing the quality of education had led to larger schools designed for children of all religious faiths. See 41 BVerfGE at 91, see also Lark E. Alloway, Comment, *The Crucifix Case: Germany’s Everson v. Board of Education?*, 15 DICK. J. INT’L L. 361, 381-83 (1997).

312. “The care and upbringing of children is a natural right of and duty primarily incumbent upon the parents.” GG art. 6(2)(1).

313. 41 BVerfGE at 49.

Law leaves the formation of public schools to the political process in the individual states.³¹⁴ The court also explained, however, that the Basic Law's guarantee of religious freedom provides not just an individual defensive right against the state, but also a positive guarantee of room for the active confirmation and development of personal convictions.³¹⁵ The court did consider parents' decision to keep their children free from religious influences a negative freedom, protected by Article Four of the Basic Law. However, the negative freedom conflicted with the positive demands of parents who wanted a religious education for their children, equally protected by Article Four of the Basic Law. In short, in an area over which the state has a great deal of control, such as the schools, the Basic Law protects both types of rights equally.³¹⁶

This "positive" freedom to choose a religious education is the fulcrum on which the first two opinions turn. By characterizing parents' wish for a Christian education as a "freedom," the court transformed the conflict into one between two groups of individuals exercising their rights, away from a conflict between the state on one side and the individuals on the other.³¹⁷ Having characterized the dispute as a conflict between competing constitutional rights of individuals—those parents seeking religious education and those rejecting it—the court reasoned that no arrangement could fully vindicate both interests.³¹⁸ Instead, the court reasoned that the obligation to resolve this tension falls to lawmakers, who should seek a compromise acceptable to all.³¹⁹ Neither positive nor negative rights had priority, the court reasoned, and a solution must be based on tolerance.³²⁰ In seeking a "middle course," however, the court reasoned that states could consider their religious traditions, the confessional make-up of the state's residents, and the strength of their religious convictions.³²¹

The court also found several limits on majority power. Specifically, the court held that states could not create

314. *Id.*

315. *Id.*

316. *See id.*

317. As one leading commentator explained in reference to the school prayer cases: the question is whether the individual right to refuse to engage in religious practices can also be the basis for the right to make all of the other students stop praying. *See Roman Herzog, Kommentar zum Grundgesetz, Art. 4 [Commentary on Article 4 of the Basic Law], in GRUNDGESETZ KOMMENTAR, supra note 126, § 4, at 25.*

318. 41 BVerfGE at 50-51.

319. *Id.*

320. *Id.*

321. *Id.*

“missionary” schools and must avoid coercion.³²² The schools in question met these standards, the court concluded.³²³ The court also found that religious influence on the curriculum, outside of religion classes themselves, simply recognized the influence of Christianity on western history without advancing the Christian faith as “true.”³²⁴ Finally, the court noted that state law directed that the views of all students must be tolerated and accepted and that no student could be isolated based on his religion.³²⁵

The third school case made clear that Article Four’s positive freedom does not include the right to demand that public schools include particular religious values or traditions.³²⁶ The court rejected a challenge from parents who wanted North Rhine-Westphalia to keep its system of confessional public schools, reasoning that the positive religious freedom of such parents was simply one interest that the state must consider when arriving at a solution that best meets the needs of everyone involved.³²⁷ In this case, the court noted, the schools in question included religious instruction, and state law required both that the confessional affiliation of the students be taken into consideration when selecting a teacher, and that instruction comport with Christian cultural values.³²⁸ On this basis, the court concluded that public officials had adequately considered the interests of parents who wished for confessional education.³²⁹

These cases illustrate the Federal Constitutional Court’s rejection of the “secular” as “neutral,” at least in the context of public schools. Denying the government latitude to engage in religious speech in areas of pervasive government control, the court reasoned, improperly refuses religion a place in public life: “Removing all ideological and religious references from the school would not resolve the ideological conflict, but would disadvantage those who desire a Christian education for their children and would compel them to send their children to a lay school that largely corresponds to the plaintiff’s world view.”³³⁰

The court also relied on a strong notion of free exercise rights that includes the “positive freedom” to advance one’s religious

322. *Id.* at 52.

323. *Id.*

324. *See id.* at 52, 64.

325. The court recognized that individual teachers and schools might not respect these limits in practice, and noted that the court remained open to other complaints on these grounds. The question here was whether the entire system was facially invalid. *Id.* at 64.

326. *See* 41 BVerfGE 88.

327. *Id.* at 95, 107.

328. *Id.* at 109.

329. *Id.*

330. *Id.*

views in the school.³³¹ This somewhat unfamiliar “freedom” is not easily labeled as either a “positive” or a “negative” constitutional right.³³² The court unambiguously stated that Article Four contains not just an individual “defensive right” (Abwehrrecht) against the state, but also requires that the state secure room for the active confirmation and development of religious convictions, particularly where the state has assumed responsibility for a particular area of life.³³³ The court reasoned, however, that this “freedom” finds its vindication to a very large degree through the political process.³³⁴ In other words, religious speech that advances religious preferences of constituents has a particular legitimacy against the claim that it violates the rights of others to avoid contact with that speech. The government’s *obligation*, however, extends only to considering the religious interests of everyone and to looking for a solution that best balances the rights of all.

The court also justified the Christian basis of the elementary schools on grounds more familiar to the American reader. First, it emphasized the historical basis of the practice, not so much as a guide to original intent,³³⁵ but as an explanation for why eliminating religion from the school could not count as “neutral.”³³⁶ The court pointed out that schools were historically divided by confession, that religion has always played an important role in education, and that the public schools are compulsory.³³⁷ The court also mentioned the cultural and

331. See *id.* at 49.

332. See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, (1986).

333. 41 BVerfGE at 49.

334. *Id.* The institution of religious instruction, on the other hand, is protected by the Basic Law, and the institution itself is not at the mercy of lawmakers except in Berlin, Bremen, and perhaps Brandenburg, although lawmakers in all states regulate the details of how religious instruction is administered.

335. In general, both in religion cases and elsewhere, the subjective intentions of the Basic Law’s framers play an understated role in deciding cases. Instead, the courts tend to use history to look for the purpose of the provision in connection with both its text and the Basic Law’s structure. KOMMERS, *supra* note 307, at 42-43.

336. 41 BVerfGE at 64.

337. The courts have rejected the claim that parents have a constitutional right to home-schooling of their children, based on either their rights as parents (Article 6(2)) or their religious liberties (Article 4). See Administrative Court for Munich, March 16, 1992, *reprinted in* 11 NVwZ 1224 (1992). The Basic Law does protect private schools in Article Seven, but subjects them to rigorous conditions, and permits private elementary schools only if they serve “a special pedagogic interest,” or are religious schools of a “type” not offered by the public systems. Article 7(5). On the other hand, the court has held that the government must

historical significance of the Christian faith, reasoning that “the affirmation of Christianity refers primarily to the recognition of its influence on culture and education, not to the truth of the faith, and is therefore in this sense justified—also against non-Christians—through the history of western culture.”³³⁸ The court used the point to explain that the curricular influences of Christianity on the public schools came within the state’s legitimate educational goals.

2. School Prayer

The court relied heavily on the reasoning of the Interdenominational School Cases when it resolved the difficult issue of voluntary school prayer in 1979.³³⁹ The state Constitutional Court in Hesse³⁴⁰ struck down a voluntary prayer on the grounds that to excuse oneself from the prayer required students to reveal their religious convictions in violation of Article 136(3) of the Weimar Constitution³⁴¹ (incorporated into the Basic Law by Article 140),³⁴² and that permitting the student to enter the class after completion of the prayer did not give the students an acceptable way of excusing themselves.³⁴³ In short, the state court found the formally voluntary prayer coercive.

The Federal Constitutional Court described the non-denominational, Christian prayers in question as religious exercises evoking God that went beyond the recognition of religion as a cultural or educational force.³⁴⁴ Nonetheless, the court found the prayers brought two basic rights into conflict, and reasoned that to insist on excluding such prayers from public schools would give absolute priority to negative religious freedoms over the positive freedoms of those who wanted the prayers.³⁴⁵ Rejecting the lower court’s conclusion that the prayers were coercive, the court reasoned that the right to not reveal one’s religious convictions did not take precedence over the rights of

subsidize certain private schools, because otherwise the right to establish them would have little value. See CURRIE, *supra* note 90, at 287-88.

338. See 41 BVerfGE at 64.

339. See 52 BVerfGE 223 (The School Prayer Case), *translated in part in* KOMMERS, *supra* note 307, at 461-66.

340. The court consolidated the case from Hesse with one from North Rhine-Westphalia in which the Federal Administrative Court, reversing two lower administrative courts, held similar prayers constitutional. *Id.* at 224-32.

341. “No one shall be bound to disclose his religious convictions.” WRV art. 136(3).

342. See 52 BVerfGE 223.

343. See *id.* at 226.

344. See *id.* at 238, 240.

345. See *id.* at 241.

others to practice their religious beliefs.³⁴⁶ Moreover, the court pointed out, the Basic Law itself created situations, particularly the refusal to bear arms,³⁴⁷ in which those who seek exemptions must similarly reveal something of their religious convictions.³⁴⁸ The court went on to note that in exceptional cases particularly sensitive students in unsympathetic schools might mean that the school must forego the prayers, but this did not justify the lower court's conclusion that any and all such prayers were unconstitutional.³⁴⁹ The court made clear that the positive freedoms involved did not compel schools to institute prayers.³⁵⁰

The court also relied on Article 7(1), which provides that "the entire educational system shall be under the supervision of the state," to explain why the schools may lead such prayers over the objections of some students and teachers.³⁵¹ Article (7)(1), the court reasoned, gives the states authority over the schools independent of individual educational goals of parents. The rights of parents and states are equal; neither takes automatic precedence.³⁵² The court ultimately, however, justified state power in relation to parents' wishes: "If the state permits school prayer in interdenominational schools, it does nothing other than exercise its [rights granted in Article 7] in a way that permits students who want to, to acknowledge their religious faith, if only in the limited form of a generally designed ecumenical invocation of God."³⁵³

In other words, the court linked the power of the school to include prayers to the religious preferences of students and parents; it did not justify religious exercises based on the state's own educational goals.

3. Crosses and Crucifixes in Courtrooms and Classrooms

The court's reasoning shifted substantially in 1995 when it struck down a Bavarian law directing that public school

346. See *id.* at 239. The court did not distinguish between situations in which students, as opposed to the school, led or initiated the prayer, concluding that in either case the prayers passed constitutional muster.

347. Article 4(3) of the Basic Law provides that "[n]o one may be compelled against his conscience to render military service involving the use of arms. Details shall be regulated by federal statute."

348. 52 BVerfGE at 241.

349. *Id.* at 241-42.

350. See *id.* at 242.

351. *Id.* at 242 (citing GG art. 7(1)).

352. *Id.* at 236 (citing Interdenominational School Cases, 41 BVerfGE 29, 44).

353. *Id.* at 241.

classrooms include a cross.³⁵⁴ Two students and their parents objected to the presence of a crucifix³⁵⁵ in their classrooms, especially the depiction of a “dying male body.”³⁵⁶ This particular case involved large crucifixes—eighty centimeters in length, with a sixty centimeter figure of Christ—placed on a table at the front of the classroom, in clear sight.³⁵⁷ The parents agreed to a compromise in which a smaller cross instead of a crucifix was placed over the door.³⁵⁸ The school eventually refused, however, to make similar adjustments in all of the classrooms in which the children received lessons, or to guarantee that it would continue to make any adjustments in the future.³⁵⁹ The parents and students sued and the Constitutional Court declared the law unconstitutional.³⁶⁰

In explaining how the court reached its decision, I begin with the dissent. The dissent emphasized that the Basic Law gives the states control over education,³⁶¹ and that the Bavarian Constitution provides that children in the public schools shall be educated on the basis of the Christian religion.³⁶² The dissent reasoned that the government may use symbols important to private religious practices in the state in order to create a space which corresponds to the religious convictions of a large number of students and their parents.³⁶³ This secures the space for individuals to actively confirm their convictions, and hence

354. See 93 BVerfGE 1 (The Classroom Crucifix Case), *translated in part in* KOMMERS, *supra* note 307, at 472-83.

355. Although the state law used the word “cross,” it made no mention of the size, appearance, or placement of classroom crosses. See *id.* at 2. This particular case involved a crucifix, but the reasoning of the Federal Constitutional Court explicitly included both crucifixes and crosses. The Author accordingly uses the word cross in reference to the state law and crucifix in reference to this particular case. In discussing the Court’s opinion, the Author uses the term cross, the word the Court used.

356. *Id.* at 2.

357. *Id.*

358. *Id.*

359. See *id.* at 3.

360. *Id.* at 1.

361. *Id.* at 27 (dissenting opinion).

362. “Die öffentlichen Volksschulen sind gemeinsame Schulen für alle Volksschulpflichtigen Kinder. In ihnen werden die Schüler nach den Grundsätzen der christlichen Bekenntnisse unterrichtet und erzogen.” [“The public elementary schools are common schools for all children who are required to go to school. In these schools, pupils are instructed and raised according to the principles of Christian beliefs.”] 93 BVerfGE at 27 (dissenting opinion) (quoting BAVARIAN CONST. art. 135). Moreover, as we have seen, the Federal Constitutional Court upheld this form of public school in 1975. See *supra* text accompanying notes 307-38.

363. 93 BVerfGE at 29-30 (dissenting opinion).

promotes religious practices and freedom.³⁶⁴ The dissent considered the crosses non-coercive because they required no active affirmation from the students, who could think as they wished about them without excusing themselves from the classroom.³⁶⁵

Moreover, the dissent reasoned that the crosses do not bring “missionary” influences into the classroom because they simply correspond to the values of the people in Bavaria itself.³⁶⁶ The dissent pointed out that life in Bavaria involves continual confrontation with crosses—on paths and roadways, in hotels, restaurants, hospitals, retirement centers, and private homes, for example—and under these circumstances a cross in the classroom corresponds to everyday life and has no missionary character.³⁶⁷ Finally, the dissent emphasized, the cross serves not just as religious symbol, but also as a symbol for the influence of Christianity on western culture.³⁶⁸ The dissent thus relied on the control of the state over education, the cultural importance of the cross, and its potential to advance the religious freedoms of individuals to conclude that the crucifix did not violate the Basic Law.

The majority retreated a significant step from its earlier emphasis on positive religious freedoms in the school.³⁶⁹ The court relied instead on the structural requirements of “neutrality,” the religious meaning of the cross, and its impact on students, in ruling the law unconstitutional.³⁷⁰ The court began by distinguishing sharply between the exercise of religious beliefs by the government and private religious expression, a point that strikes at the heart of the positive freedom to express one’s views through the government.³⁷¹ The court reasoned that the placement of crosses violated the Basic Law’s requirement of “neutrality” because the cross symbolizes Christianity and represents, among other things, the martyrdom of Christ and Christ’s victory over Satan and death.³⁷² For non-Christians, the court concluded, the cross represented the missionary character of the Christian faith, and in the context of the classroom presented the Christian faith as exemplary and worthy of

364. See *id.* at 30 (dissenting opinion).

365. *Id.*

366. See *id.* at 33 (dissenting opinion).

367. See *id.*

368. See *id.* at 32-33 (dissenting opinion).

369. See *supra* text at notes 313-34.

370. *Id.* at 18.

371. *Id.* at 18.

372. *Id.* at 19.

emulation.³⁷³ While not completely clear on this point, the court seemed to conclude that the cross was also coercive when it emphasized that students must confront it for long periods of time with no way of excusing themselves, distinguishing this situation from the School Prayer Case.³⁷⁴ Although the court still nominally considered the conflict as one between positive and negative freedoms, it rejected the claim that the positive religious freedom of some parents and students justified the cross. The court concluded that the law-makers had not reached an acceptable compromise because they completely disregarded other views and permitted Christian students to receive instruction "under" the symbol of their faith.³⁷⁵

The court also distinguished an earlier case in which it held that the state must remove a crucifix from its courtroom at the request of a Jewish litigant and her Jewish lawyer, but refused to hold that all such crucifixes violated the Basic Law.³⁷⁶ In the earlier case, the court reasoned that in many situations the cross might correspond to the beliefs of everyone in the courtroom, making it constitutionally unobjectionable.³⁷⁷ The 1995 court distinguished the case on the grounds that schools, unlike courtrooms, involve both particularly impressionable students and long-term, repeated exposure to the religious symbol.³⁷⁸ The two opinions nevertheless stand in some tension, in no small part because the 1995 decision suggests rather powerfully that all crosses put up by the state violate the Basic Law, while the earlier case explicitly reasoned otherwise.³⁷⁹

The court's decision in the Classroom Crucifix Case met with intense criticism. Chancellor Kohl deemed the decision "incomprehensible,"³⁸⁰ a judgment shared by more than a few commentators.³⁸¹ A former President of the Federal Constitutional Court called the decision a "bad mistake."³⁸² Prominent Bavarian politicians and elected officials called for officials to disregard the

373. *Id.* at 20.

374. *Id.*

375. *See id.* at 24.

376. *See* 35 BVerfGE 366 (The Courtroom Crucifix Case).

377. *Id.* at 375.

378. 93 BVerfGE at 18, 20.

379. *See* Axel Frhr. von Campenhausen, *On the Crucifix Decision*, *supra* note 107, at 459-60.

380. *See* KOMMERS, *supra* note 307, at 482.

381. Prominent examples include Axel Frhr. von Campenhausen, *On the Crucifix Decision*, *supra* note 107, at 449; Ernst Benda, *Wirkliche Götterdämmerung in Karlsruhe?* [*Real Twilight of the Gods in Karlsruhe?*], 48 NJW 2470 (1995); Heckel, *supra* note 299, at 456.

382. *See* Benda, *supra* note 381, at 2470.

court's ruling,³⁸³ fueling claims that the opinion harmed the reputation of the court and tested the faithfulness of the people to the rule of law (Rechtstreue).³⁸⁴ The Constitutional Court responded, remarkably, with a "clarification."³⁸⁵ The court stated that the head notes for the opinion might be misleading and that it held unconstitutional only the *state-ordered* placement of the cross in the classroom.³⁸⁶ The correction of head notes is of little help, one commentator noted, when their content is repeated by the court's reasoning, which supports only the conclusion that all crosses in classrooms are unconstitutional.³⁸⁷

Scholars have trained their criticism on four problems with the Classroom Crucifix Opinion in addition to its "incoherence." First, the court made a significant break with its earlier decisions, without acknowledging or defending the change.³⁸⁸ Second, the court unnecessarily resolved an entire class of cases, and its reasoning suggested that all classroom crosses must come down, even though the court could have simply struck down the law in question on the far narrower grounds that it provided no mechanism by which the state could consider removing the cross in individual cases.³⁸⁹ Third, the court's conclusion that the law violated the state's obligation to neutrality rested on dubious, sweeping statements about the "meaning" of the cross, a theological matter over which the court has no authority.³⁹⁰ Finally, the court intruded on matters that the Basic Law intentionally left to the states in order that they might consider local religious beliefs and history in resolving conflicts around religious influences in the public schools.³⁹¹

Bavaria responded to the court's decision with a new law in December of 1995.³⁹² The new law draws substantially from a

383. *Das Kreuz ist der Nerv [The Cross is the Nerve]*, DER SPIEGEL, no. 33, 1995, at 22-23.

384. See Axel Frhr. von Campenhausen, *On the Crucifix Decision*, *supra* note 107, at 449 (quoting Stern, *Die Fehler der Richter [The Mistakes of the Judges]*, 312 DIE POLITISCHE MEINUNG 5 (1995)).

385. *Id.*

386. *See id.*

387. *See id.*

388. *See id.* at 457-60; Heckel, *supra* note 299, at 456, 458-59.

389. See Axel Frhr. von Campenhausen, *On the Crucifix Decision*, *supra* note 107, at 454.

390. *See id.* at 453-54, 460-62; Heckel, *supra* note 299, at 456, 465-66.

391. See Axel Frhr. von Campenhausen, *On the Crucifix Decision*, *supra* note 107, at 455-57; Karl-Hermann Kästner, *Lernen unter dem Kreuz [Learning Under the Cross]*, 41 ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT 241, 266-71 (1996).

392. For legislative history see Gerhard Czermak, *Das bayerische Kreuzifix-Gesetz und die Entscheidung des BayVerfGH vom 1.8.1997 [The Bavarian Crucifix Law and the decision of the Bavarian Constitutional Court of August 1, 1997]*, 51 DIE ÖFFENTLICHE VERWALTUNG 107 (1998). The law passed by a vote of 97 to 68.

report commissioned by the state of Bavaria and written by Peter Badura, former president of the Federal Constitutional Court.³⁹³ Like the old law, the new one provides for crosses in Bavarian classrooms.³⁹⁴ Under the new law, however, if parents object to the cross based on honest and "visible" or expressible principles of their faith or world view, then the school must seek a compromise.³⁹⁵ If it finds no compromise, then the school must create a rule for each individual case that respects the freedom of the complainant and the religious views of everyone in the class.³⁹⁶ In that decision the school must consider, to the greatest degree possible, the desires of the majority.³⁹⁷ The new law, according to Badura, stays within the "Spielraum" or "room for play" afforded to the states by the Basic Law and Constitutional Court's 1995 decision.³⁹⁸

The Bavarian Constitutional Court upheld the law in August of 1997.³⁹⁹ Considering largely the question of whether the new law violated the Bavarian State Constitution, the court reasoned that the law had two legitimate purposes: recognizing the historical and cultural importance of Christianity and promoting the religious expression of those who wanted crucifixes in the classroom.⁴⁰⁰ The court distinguished the law from the one ruled unconstitutional by the Federal Constitutional Court on the grounds that the new law explicitly provided a way for students and parents who objected to the cross to request its removal.⁴⁰¹ So far, the Federal Constitutional Court has refused to consider,

Christian Social Union members voted for it; the Social Democrats, with one exception, and the Green Party members voted against it. *Id.* at 109.

393. The report is reprinted in full in 1996 BAYERISCHE VERWALTUNGSBLÄTTER 33.

394. Czermak, *supra* note 392, at 107.

395. "Wird die Anbringung des Kreuzes aus ernsthaften und einsehbaren Gründen des Glaubens oder der Weltanschauung durch die Erziehungsberechtigten widersprochen, versucht der Schulleiter eine gütliche Einigung." See Czermak, *supra* note 392, at 107. The phrase "ernsthaften und einsehbaren," imperfectly translated as "honest and expressible," is frequently used by the courts to explain the burden on those seeking exemptions from generally applicable laws. The phrase was used by the Constitutional Court in the Courtroom Crucifix Case to describe the burden on litigants who sought removal of the cross. 35 BVerfGE 366, 376.

396. Czermak, *supra* note 392, at 107.

397. *Id.*

398. *Id.* at 108.

399. See Decision of the Bavarian Constitutional Court, August 1, 1997, reprinted in 50 NJW 3157 (1997).

400. *Id.* at 3158-59.

401. *Id.* at 3162.

for procedural reasons, the merits of the constitutional complaints challenging the new Bavarian law.⁴⁰²

B. *The Limits of Private Religious Choice Reasoning:
Government Religious Speech*

The pluralist position has not, as discussed in Part II, given a clear answer to the problems posed by government religious speech.⁴⁰³ The German cases point to problems with pluralist arguments that the government should engage in no religious speech and that the government speech should “mirror” private religious choice, and to difficulties in understanding proselytization from a private choice perspective. To this it adds the perspective that government religious speech can itself advance private religious choice by reflecting not merely the practices, but also the preferences of private constituents. Building on this reasoning, the courts have developed a normative view of how the political process should function in creating government religious speech. This section begins with a discussion of private religious choice, coercion, and proselytization in German and American cases, and concludes with a discussion of constituent preferences and private religious choice.

The goal of the discussion in this section is to explain how the United States and Germany are drawing closer in their Establishment Clause jurisprudence; to make clear the limits of private religious choice analysis in understanding proselytization and in arguing that government speech should “mirror” private choice; and to note the correspondence between the German emphasis on local decision-making and the proposals of the some Establishment Clause scholars in the United States. Although the last part of this section offers something of a “defense” for the German system, it does so as way of illustrating weaknesses in the U.S. system, not as suggestion that any particular cases should be decided differently, or that the United States should adopt any wholesale version of the German jurisprudence.

1. Coercion

Coercion emerged as a key component of government speech cases as the Supreme Court retreated from separation, based in

402. See Decision of the Federal Constitutional Court, December 4, 1997, reprinted in 17 NVwZ 156 (1998) (refusing to consider the merits of the challenge); see also Czermak, *supra* note 392, at 114.

403. See *supra* Part II.

part on the reasoning that the private religious lives of the people made a government that could engage in no religious speech overly hostile to religion.⁴⁰⁴ American courts long accepted this point in contexts like the military, where the government itself may take some religious action, like hiring chaplains, in order to meet the free exercise needs of the people over whom it has a great deal of control.⁴⁰⁵ In 1963, Justice Stewart argued in *Schempp* that this argument extends to schools as well: "a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in the schools, religion is placed at an artificial and state-created disadvantage."⁴⁰⁶ Like the Germans, Stewart emphasized the government's control over the public space. Stewart reasoned that even if the Free Exercise Clause did not require the government's actions, those actions "mak[e] possible the free exercise of religion," insulating them from Establishment Clause claims unless they qualify as coercive.⁴⁰⁷

Justice Stewart's opinion garnered not one additional vote in *Schempp*,⁴⁰⁸ and as long as the separationist position of the *Schempp* majority prevailed, government religious speech had little formal, constitutional relationship to private religious convictions. Instead, the Court upheld such speech based on historical practice,⁴⁰⁹ the secular meaning of the speech,⁴¹⁰ and the government's secular goals in engaging in the speech.⁴¹¹ Others have thoroughly criticized this logic elsewhere.⁴¹² Important here is that none of these inquiries has much to do with private religious institutions or private religious choice, and all contain biases toward historically dominant religions (read

404. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 657-58 (Kennedy, J., dissenting).

405. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 226 n.10, 299 (Brennan, J., concurring) (1962).

406. *Id.* at 313 (Stewart, J., dissenting). *Schempp* held unconstitutional state laws requiring reading from the Bible in public schools but permitting students to excuse themselves. See *id.* at 205-27.

407. *Id.* at 316 (Stewart, J., dissenting).

408. See *id.* at 308.

409. See *County of Allegheny v. ACLU*, 492 U.S. 573, 663 (1989) (Kennedy, J., dissenting); *Lynch v. Donnelly*, 465 U.S. 668, 674-78 (1983); *Marsh v. Chambers*, 463 U.S. 783, 791 (1983).

410. See *Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring); *Lynch*, 465 U.S. at 710 (Brennan, J., dissenting); *McGowan v. Maryland*, 366 U.S. 420, 444 (1961).

411. See *Lynch*, 465 U.S. at 717 (1984) (Brennan, J., dissenting); *id.* at 693 (O'Connor, J., concurring).

412. See Epstein, *supra* note 61, at 2154-71; William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall - A Comment on Lynch v. Donnelly*, 1984 DUKE L. J. 770; Wallace, *supra* note 24, at 1202-23.

Christianity) and serve to legitimate speech that derives from those religious traditions.

Justice Kennedy, however, revived a version of Justice Stewart's argument in *Allegheny*, reasoning that the powerful presence of government makes an entirely secular public sphere non-neutral.⁴¹³ This was an extension of Stewart's more limited, but otherwise similar point in the context of public schools.⁴¹⁴ Justice Kennedy also reached the same conclusion: the constitutional problem arises not so much from the government's speech, but from the potential coercion of those forced to listen.⁴¹⁵ While Justice Stewart seemed concerned with policing the correspondence between the speech of the government and the wishes of the community, Justice Kennedy left this process largely to the majority.⁴¹⁶

The focus on coercion in *Allegheny* mustered a majority of the Court four years later in *Lee v. Weisman*,⁴¹⁷ moving American reasoning, at least temporarily, a significant step toward Germany's, where school prayer cases have revolved largely around the issue of coercion.⁴¹⁸ The majorities in *Engel* and *Schempp*, on the other hand, did not reach the coercion question, concluding instead that government involvement in the speech made it unconstitutional, whether or not it was coercive.⁴¹⁹ The replacement of Justice White by Justice Ginsburg has likely shifted the Court away from coercion, toward a more restrictive approach.⁴²⁰

Disagreement over exactly what constitutes coercion is remarkably similar in the two countries. The School Prayer cases in Germany, for example, asked what threat or pressure makes

413. See *County of Allegheny*, 492 U.S. at 656-57 (Kennedy, J., dissenting).

414. See *id.* at 660 (Kennedy, J., dissenting).

415. *Id.*

416. See *id.*

417. *Lee v. Weisman*, 505 U.S. 577 (1992). The five Justices who agreed on the coercion test did not agree on its application to the commencement prayer at issue.

418. See text accompanying *supra* notes 339-53.

419. See *supra* note 64 (discussing *Engel*). The *Schempp* majority focused on the government's role in drafting the prayer, not on whether the opportunity to excuse oneself made the setting non-coercive. See *Schempp*, 374 U.S. at 223-26. Stewart, dissenting, argued that coercion was the appropriate inquiry. See *id.* at 313.

420. Justice Ginsburg wrote a short dissent in *Capitol Square Review & Advisory Board v. Pinnette* and joined Justice Souter's dissent in *Rosenberger v. Rector & Visitors of Univ. of Virginia. Capitol Square*, 515 U.S. 753, 817-18 (suggesting that the goal of the Establishment Clause is "to uncouple government from church," and reasoning that a Ku Klux Klan cross displayed in a public forum near the Ohio state capitol violated the Clause); *Rosenberger*, 515 U.S. 819, 863-99 (joining Justice Souter's dissent).

the situation created by the government unconstitutional.⁴²¹ This is one of the issues that divided Justices Kennedy and Scalia in *Weisman*.⁴²² In both countries, some conclude that indirect pressure to conform one's behavior, such as social pressure to stand during the prayer or the necessity of disclosing one's religious beliefs in order to ask to be excused,⁴²³ make the decision to participate in a commencement or other school prayer unconstitutionally constrained.⁴²⁴ Others conclude that only more direct pressures make the practice unconstitutional.⁴²⁵ The Classroom Crucifix Case presented the other side of the problem: while the state clearly pressured (under threat of legal sanction) students to attend schools with crosses in the classrooms, the Federal Constitutional Court disagreed as to whether the observation of the crucifix amounted to "coercion." The dissent reasoned that only forced participation, or affirmation of the speech or symbol, could create a true conflict of conscience,⁴²⁶ while the majority held that the "appellative" character of the cross and its symbolic statement that Christianity is worthy of emulation made it unconstitutional.⁴²⁷ *Weisman* raised this problem as well. Justice Kennedy suggested that coerced attendance did not make the situation objectionable, but pressure to participate did.⁴²⁸ It is fair to say that whether coercion was involved in *Weisman*, what its nature was, and if and why it rendered the prayer unconstitutional, remains a much-debated question.⁴²⁹

421. See *supra* text accompanying notes 339-53.

422. For a discussion of this problem in *Weisman*, see Paulsen, *Lemon is Dead*, *supra* note 24, at 847-48.

423. Professor Paulsen argues, just as the lower courts in the school prayer cases reasoned, that the requirement of revealing at least something of one's religious beliefs is inherent in asking to be excused and makes religious exercises in the schools unconstitutionally coercive. *Id.* at 847-48.

424. See 52 BVerfGE at 233, 245-46 (describing the decision of the lower court in Hesse).

425. See *Lee v. Weisman*, 505 U.S. 577, 640-43 (Scalia, J. dissenting).

426. See 93 BVerfGE at 33 (dissenting opinion).

427. See *id.* at 20.

428. 505 U.S. at 592-93.

429. See Paulsen, *Lemon is Dead*, *supra* note 24, at 825-43; see, e.g., Richard S. Myers, *A Comment on the Death of Lemon*, 43 CASE W. RES. L. REV. 903, 905-06 (1993) (reasoning that the *Weisman* prayer was not a worship service); Paulsen, *Lemon is Dead*, *supra* note 24, at 828-31 (concluding that *Weisman* involved coerced attendance at a religious worship service); Wallace, *supra* note 24, at 1263 n.379 (suggesting that *Weisman* involved coerced attendance at, but not participation in, a prayer that does not qualify as a worship service). Justice Kennedy reasoned that the coercion was to *participate* in the prayer, but had trouble showing that participation in the prayer, rather than just attendance at an event during which the prayer was recited, was subject to enough pressure from the state to qualify as a coerced decision.

2. Proselytization

Missionary speech, or “proselytizing,” in a non-coercive context, presents a more difficult question from the perspective of private religious choice. On the one hand, listeners are free to reject the message of the speech, and may be free to abstain entirely from listening or observing. On the other hand, avoiding government religious speech has its cost. If coercion only includes forced participation or affirmation, situations arise in which people *are* pressured to hear or see government speech, even if they are not forced to affirm it. The dissent in the Classroom Crucifix Case reasoned that it might reject government speech if, and to the extent that, the government goes beyond the religious symbols prevalent in the community.⁴³⁰ That is, where a pluralistic community continually displays only one type of religious symbol, it is likely that the government’s motives are improper—it seeks not to reflect private choices, but to advance one religion and manipulate private choices in favor of it. Or, stated another way, the process has been subject to majority capture. The dissent in the Classroom Crucifix Case responded to this concern when it insisted that crucifixes are not the product of *government* manipulation, but instead of the background culture in Bavaria.⁴³¹ This corresponds neatly to McConnell’s point that if government speech mirrors private religious practices, it has not distorted private religious preferences.⁴³² The problem remains, however, of the listener who does not agree with the speech, even if the speech accurately reflects private religious practices.

Some reason that government speech “endorsing” a particular religious viewpoint suggests that those not sharing that viewpoint are not as welcome in the process of government. This forms the core of Justice O’Connor’s endorsement test, which asks whether the challenged practice “endorses” religion or non-religion from the perspective of an “objective observer.”⁴³³ The problems with this test, with respect to the goal of protecting private religious choice, include an anti-religious bias that suggests that little or no religious speech is appropriate,⁴³⁴ and

430. 93 BVerfGE at 30 (dissenting opinion).

431. *Id.*

432. McConnell, *Crossroads*, *supra* note 24, at 193.

433. *Capitol Square Review & Advisory Bd. v. Pinnette*, 515 U.S. 753, 772-83 (1995) (O’Connor, J., concurring in part & concurring in judgment).

434. See Epstein, *supra* note 61, at 2137-54 (reasoning, under the endorsement test, that virtually all forms of “ceremonial deism” including government religious holidays such as Christmas, violate the Establishment Clause); McConnell, *Crossroads*, *supra* note 24, at 152-54 (arguing, *inter alia*, that

the lack of a coherent approach to accommodation of private religious practices, which may well appear to "endorse religion."⁴³⁵

The German Classroom Crucifix Case raises another issue for listener-based concerns: how do we analyze government religious speech with which all taxpayers and listeners agree?⁴³⁶ Public furor arose around the Federal Constitutional Court's reasoning that crosses in classrooms violate the state's obligation to "neutrality," because this reasoning suggested rather powerfully that all such crosses must come down, whether or not students or parents object.⁴³⁷ By relying on "neutrality," the Court retreated from an approach based purely on conflicting individual rights, perhaps due to the difficulties in explaining exactly why and when non-coercive speech violates the individual liberties of observers who do not object to the speech.⁴³⁸

Protection of *individual* autonomy alone does not require prohibiting government religious speech until someone who disagrees with it is forced to listen. Protection of *political* autonomy does, however, require this limit. Religious speech by the government that "advocates" one religion tends to make

the endorsement test is applied against government endorsement of religion but never against government disapproval of religion because in the former case, the religious practice in question is readily apparent, but in the latter case, it is hidden by secular alternation practices).

435. For a discussion of this and many other problems with the test, including its indeterminacy, see Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 276-309 (1987) [hereinafter Smith, *Symbols*].

436. This sounds like an entirely academic question, because the courts will not be faced with cases in which no one objects to the speech. Nonetheless, it has profound impact on what the courts' rulings mean in practice. If crosses are only unconstitutional when someone objects to them, Bavarian officials will likely only remove them when such an objection is lodged. Consider, too, the case of *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), in which a principal required a teacher to remove a Bible from the top of his desk and two religious books from the library, although it appears that neither parents nor students actually objected to them. The principal believed instead that the Constitution required her actions. See Steven D. Smith, *Unprincipled Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 497 (1996) [hereinafter Smith, *Unprincipled Religious Freedom*].

437. Czermak, *supra* note 392, at 108; Axel Frhr. von Campenhausen, *On the Crucifix Decision*, *supra* note 107, at 449.

438. McConnell argues that the government may not proselytize because a) "the state has far superior means by which to advocate its view of spiritual truth," b) "those means are supplied by the citizens through other coercive powers including taxation," and c) "the state is limited to performing those functions authorized by the people, and there is no reason to suppose that a religiously pluralistic people . . . would entrust the function of religious instruction to political authorities." McConnell, *Crossroads*, *supra* note 24, at 162. The second two reasons do not apply to this hypothetical, and the first seems to simply give more force to the second and third.

challenge and dissent more difficult, and tacitly endorses one religious perspective as more "normal." Members of a homogeneous community, one could hypothesize, may have this as their private, religiously motivated goal: they want to make personal change more difficult because they believe that they have arrived at the truth. As a matter of personal autonomy, such speech need not be limited by the Establishment Clause; after all, individuals in the community can change their mind, or opt for different speech. Political autonomy does require this limitation: public space must remain open to change, even if interests of personal autonomy do not compel this result. The Establishment Clause limits proselytizing because where the government's own opinions on religious truth and values are strong, the problem of creating public space available to challenge those opinions is too great.⁴³⁹

The German cases build on the importance of political autonomy by considering in part how the process of forming government speech should function, relying to some extent on local and case-specific factors.⁴⁴⁰ By asking if the objection was based on "honest" and "expressible" reasons, for example, the Federal Constitutional Court easily credited the objection of a Jewish plaintiff in the Courtroom Crucifix case, but did not resolve the issue for all plaintiffs.⁴⁴¹ In the United States, even Justice O'Connor, who focuses on the problems of exclusion from government, relies on the perspective of an "objective observer," and asks how the speech would impact a hypothetical, well-educated, constitutionally literate observer, not how it impacts the people actually involved in the litigation.⁴⁴² The following section discusses the normative view of the political process in the German cases and its emphasis on local and case-specific issues.

3. Government Religious Speech Based on Constituent Preferences

The German cases justify government speech in part based on its relationship to private constituent practices. The dissent in

439. Justice O'Connor makes this point when she reasons that endorsement sends a "message" to "adherents that they are insiders, favored members of the community." *Lynch v. Donnelly*, 465 U.S. 688, 687-88 (1984).

440. See *infra* text accompanying notes 453-56.

441. 35 BVerfGE 366.

442. *Capitol Square Review & Advisory Bd. v. Pinnette*, 515 U.S. 753, 772-73 (O'Connor, J., concurring); see also Smith, *Symbols*, *supra* note 435, at 294-45 (arguing that the "objective observer" undermines the goal of preventing the government from sending messages of exclusion because the controlling standard is not "the actual perceptions of real citizens").

the Classroom Crucifix Case, for example, emphasized the ubiquity of crosses in Bavaria and reasoned that education

is an area in which the dealings of the state and the freedom of citizens meet. In such an area the government may use meaningful symbols, which are frequently used in that particular state, to create an organizational space in which a large percentage of the students and their parents can realize their religious convictions.⁴⁴³

The majority made the same point in the Interdenominational School Cases: "State law makers can consider the fact that the majority of the state's citizens belong to a Christian church. They are not denied the power to maintain the greatest possible correspondence between school and home in religious matters."⁴⁴⁴

This emphasis on correspondence between private and public religion recalls McConnell's insistence that government religious speech should avoid distorting private religion practices in precisely this way.⁴⁴⁵ As the following section discusses, Germans have also, however, translated the theoretical niceties of speech that correspond to private religious practice into some insights as to how private preferences get translated into government religious speech. Professor McConnell, on the other hand, largely kicks this translation back to the political process, with no proposal for how that process should work.⁴⁴⁶ Indeed, the German normative reliance on compromise through the political process rejects a fundamental tenet of McConnell's approach to private religious choice: compromise tends to create homogenous speech reminiscent of a "civil religion" that mirrors no actual religious practices.⁴⁴⁷ McConnell's rejection of this approach represents weakness in a pure private religious choice approach to government religious speech; it provides a theoretical answer that democracy cannot produce, and it does not recognize participation in government as legitimate private religious choice.

By focusing on individual interests and the process of translating preferences into government speech, the German cases offer a glimpse of a locally-based approach to such speech that corresponds to some efforts at Establishment Clause reform in the United States. First, however, a cautionary note: this next section builds on how the German courts reason, but it goes beyond what they have held. For example, the Federal Constitutional Court looks for correspondence between

443. See 93 BVerfGE at 30 (dissenting opinion).

444. 41 BVerfGE at 60.

445. See *supra* text accompanying note 78.

446. See *supra* text accompanying notes 86-89.

447. McConnell, *Crossroads*, *supra* note 24, at 168-69, 175, 190, 193.

government and private religious speech, but while in the cases this has largely *justified* religious speech, a lack of correspondence has never provided a basis for barring government religious speech. Moreover, the German cases considered here, with the sole exception of the Courtroom Crucifix case, all involve public schools. The analysis that follows suggests that this reasoning could apply outside of this context, and thus moves significantly beyond what the German cases have held.

(a) Localized Constitutional Adjudication

If government religious speech is justified by the “people’s religious institutions,” it follows that differences in these institutions may mean differences in the constitutionality of the government’s speech. After concluding that the form of the school is left up to the state, the Constitutional Court reasoned in the Interdenominational School Cases that “depending on the confession or world-view of the relevant parents it might be the case that states could not establish certain of the [otherwise permissible] forms of the school, or could not do so without ensuring sufficient alternatives to the normal form of the schools.”⁴⁴⁸

Similarly, the dissent in the Classroom Crucifix Case emphasized that the Christian basis of the public schools was the result of a popular vote in Bavaria, that most of the citizens in the state belong to a Christian church, and that it was fair to assume that even some people not associated with the churches would still respect the symbol.⁴⁴⁹ Moreover, the dissent pointed out that the symbol in question was one prevalent in private religious life in Bavaria.⁴⁵⁰ Even commentators critical of the court’s decision reason that a crucifix in a class of primarily Islamic students, in the state of Bavaria where the crosses are otherwise permissible, would not pass constitutional muster.⁴⁵¹

Justice Stewart made a similar point in *Schempp* when he considered whether the school board would permit local variations on the Bible readings if selected, if parents so requested.⁴⁵² Justice Stewart reasoned that Government action must not “weight the scales of private choice,” and that

448. 41 BVerfGE at 48.

449. 93 BVerfGE at 28 (dissenting opinion).

450. *Id.*

451. Stefan Mückel, *Überkreuz mit dem Kreuz* [At Cross Purposes with the Cross], 2 KIRCHE UND RECHT, *supra* note 153, at 65, 80.

452. *Abington Sch. Dist. v. Schempp*, 373 U.S. 203, 315 (1963) (Stewart, J., dissenting).

government initiated religious exercises do not “weight” such choice “if they simply reflect the differences which exist in the society from which the school draws its pupils.”⁴⁵³ Flexibility by local school boards in the face of community requests strengthens the argument that the Bible readings only reflect that community, but if local school boards or state law “prohibit local schools from substituting a different set of readings where parents requested such a change,” then the practices less likely result from, or conform to, community preferences.⁴⁵⁴

As a result of this type of reasoning, constitutional adjudication is more localized and context-specific in Germany than in the United States. In the Courtroom Crucifix Case, for example, the Federal Constitutional Court required the removal of a crucifix from the courtroom at the request of Jewish litigants.⁴⁵⁵ However, it did not hold all such crucifixes unconstitutional, noting that in many cases they correspond to the views of everyone involved.⁴⁵⁶ Similarly, the court upheld voluntary school prayer, but did not rule out that under certain circumstances such prayer could be unconstitutionally coercive, depending, in part, on the religious make-up of the class.⁴⁵⁷ Public schools based on Christianity might be unconstitutional, the court suggested, when the constituents’ religious beliefs did not justify them.⁴⁵⁸ On the other hand, certain practices—such as non-voluntary school prayer—remain off-limits under bright-line rules not subject to local changes.

Our jurisprudence does not do this: Bible reading, school prayer, released time programs, and prayers at the beginning of commencement addresses, it tells us, are either constitutional or unconstitutional in their particular form everywhere, regardless of the presence or lack of an objection, the basis or strength of that objection, or the how the make-up of the community speaks for or against such government actions.⁴⁵⁹ As Justice Kennedy stated in *Weisman*, in discussing the state’s role in selecting and composing the commencement prayer: “A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that

453. *Id.* at 317-18.

454. *Id.* at 318.

455. 35 BVerfGE at 366.

456. *Id.*

457. See 52 BVerfGE at 252-53.

458. See 41 BVerfGE at 48.

459. See, e.g., Smith, *Unprincipled Religious Freedom*, *supra* note 436, at 501.

the prayers must occur."⁴⁶⁰ In Germany *exactly* this difference may make Bavaria's new law permitting crosses in classrooms constitutional, while the old law requiring such a cross was unconstitutional.⁴⁶¹

In the United States, Professor Steven Smith has advocated judicial reasoning along the German lines based on his argument that no one principle can satisfactorily resolve religion cases.⁴⁶² Smith attacks "principles" because they mean that what is valid for a school board in Louisiana must also be valid in Massachusetts, raising the stakes of constitutional adjudication and raising the passion and alienation that results from a decision.⁴⁶³ If the courts and constitutional scholars in the America have "undermined the ability of communities and institutions to work out acceptable accommodation for competing religious and secular concerns,"⁴⁶⁴ as Smith argues, then the German courts may give an example of how courts could promote such an ability.⁴⁶⁵ Indeed, Smith's suggestions about how local officials might consider such programs often bring to mind the reasoning of the German courts. Smith suggests that local officials can reach "compromises" in "good faith" that achieve some sort of accommodation,⁴⁶⁶ recalling the German emphasis on consensus building discussed in the following section. Smith's optimistic hope that such compromises could provide the

460. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

461. The room for local officials to remove the cross when faced with objections is the main difference between the old and the new laws. Some argue that this difference is not enough to make the new law constitutional. See Czermak, *supra* note 392, at 109-13.

462. Smith, *Unprincipled Religious Freedom*, *supra* note 436, at 498.

463. *See id.* at 501.

464. *See id.* at 515.

465. The crucifix issue provides a potential example. Consider a law like the one now in place in Bavaria. Imagine that the practice is to use small crosses over the door, rather than at the front of the classroom. The traditional German approach to this problem permits concrete factors to resolve the constitutionality of the cross in each case: what is the basis of the objection? How did school authorities address the objection; what are the possibilities for compromise? What is the risk that the dissenting students will be singled out (this may mean that the size of the majority cuts the other way)? May other students request that the school display other religious symbols? Why did the school refuse to remove the cross when confronted with the objection? Perhaps under such a calculus some crosses would be acceptable, whether in inner city or rural southern schools, and perhaps many or all would have to come down when students or parents objected.

Such an approach may make the issue far less divisive, and it certainly gives a far different guidance for how local officials should resolve disputes. The standard to which the courts hold local officials is that of a reasonable compromise under the circumstances at hand, not determining if, and who, has a "right" that must trump others.

466. Smith, *Unprincipled Religious Freedom*, *supra* note 436, at 502.

occasion to teach about “religious commitment, religious diversity, and tolerance,”⁴⁶⁷ is virtually identical to the Federal Constitutional Court’s reasoning that permitting the public schools to have a Christian basis, but requiring toleration and acceptance of all religions, could give everyone the opportunity to learn to respect the freedoms of others.⁴⁶⁸

(b) Consideration of all Viewpoints

The German courts make explicit that any decision by the government in this area must consider the rights of all, and must operate from the basic principle of tolerance.⁴⁶⁹ In describing the *obligation* of law-makers, the Federal Constitutional Court explained that “[t]o solve the inevitable tension between positive and negative religious freedoms in the schools, the democratic law-makers are obligated in forming public policy to seek a tolerable compromise for everyone with consideration of the various views.”⁴⁷⁰ In this balancing process, the court has said, the government cannot simply give negative or positive demands automatic priority.⁴⁷¹

This approach, although it may sound hopelessly “squishy” and standard-less to an American observer, particularly as an inquiry by the courts, may help to answer some of the objections to government religious speech, particularly on the local level. Professor Karst has written, for example, that “[l]eaving decisions about official symbols of religion to ‘communities’ means leaving them to politics. With negligible exceptions, local Christian majorities need not bargain at all in order to display the symbols of their own religion.”⁴⁷²

The German reasoning provides a powerful incentive to bargain: compromise with, and consideration of, minority views can help insure that the practice passes muster under the Basic Law. Moreover, concrete factors help determine whether local officials have truly sought a compromise. Coercive practices, situations in which it is difficult to excuse oneself, or situations in which access to the public space in question is granted to only one type of religious speech despite requests by others for inclusion, all suggest a lack of concern with minority religious speech. The point is not that these factors are novel, but that the

467. *Id.*

468. *See* 41 BVerfGE at 64.

469. *See id.*

470. *See id.* at 50.

471. 41 BVerfGE at 49.

472. Karst, *supra* note 76, at 526.

German approach grounds them in a normative view of how local decision-making should function.

One might object to this sort of reasoning on the grounds that it is too "transparent," and that the Supreme Court loses legitimacy because it relies on factors that are both local and more contested, failing to preserve "the Court's appearance of neutrality."⁴⁷³ In this situation, the link between opacity and legitimacy is not clear as a factual matter. The Classroom Crucifix Case, which appeared to eschew balancing individual interests in favor of a bright-line rule that said all crosses in all schools were unconstitutional, seriously undermined the Federal Constitutional Court's legitimacy. The cases in which the courts routinely balance religious objections against the interests of the state have created no such problems. In the United States, "bright-line" cases like *Employment Div. v. Smith*⁴⁷⁴ and those abolishing school prayer have not added to the Court's popular legitimacy.⁴⁷⁵ This suggests that some opaque rules, those that pretend to equate what we know is different (i.e., possible Jewish and Catholic objections to crosses in Germany), also threaten the Court's "institutional position."⁴⁷⁶

One might take a different tack and say that when it comes to government religious speech, a bright-line no-speech rule better protects minority interests than a more flexible approach.⁴⁷⁷ A flexible approach, which involves weighing competing claims to public space, puts the courts in the business

473. Lawrence Lessig, *Post Constitutionalism*, 94 MICH. L. REV. 1422, 1448 (1996).

474. 494 U.S. 872 (1990). For a partial list of articles critical of *Smith*, see Lupu, *supra* note 29, at 251 n.162.

475. The decisions striking down school prayer may have the general support of the scholarly community, but they have probably detracted from the Court's popular legitimacy. See GARY L. MCDOWELL, *CURBING THE COURTS: THE CONSTITUTION AND THE LIMITS OF JUDICIAL POWER* 155-57 (1988).

476. Lessig, *supra* note 473, at 1449. Lessig discusses the Courts' own perception of what threatens its legitimacy, which is a different question than what threatens that legitimacy in the eyes of scholars or the general public.

477. Another objection is that a decentralized system always puts dissenters in the position of having to raise an objection. This is true, and it speaks for some global rules. The question of burdens, however, is a tricky one. Even a simple invitation to bring religious symbols into the classroom puts a unique burden on students of minority or unpopular religions, who must forego their symbols (and risk ridicule) or bring their symbols with them (and run the same risk). Even if the state operates no public schools, however, the burden is particularly great on minority religions with few members, who will incur more expense to form their own schools. A state that has public schools with no trace of religion may cause conflicts for minority religious students who disagree with what is taught, or who may not go to the prom or watch films. Minority religions will always have a particular burden to seek exemptions from a culture based on other religious traditions.

of evaluating the strength of religious convictions and may open the door to discrimination by the courts against minority religious claims. A related argument is often made in the United States against legislative or judicial accommodation of religion.⁴⁷⁸

In Germany, the Basic Law's aggressive protection of free exercise rights requires a wide variety of religious exemptions from generally applicable laws,⁴⁷⁹ and law-makers have provided additional exemptions and accommodations for religiously motivated conduct.⁴⁸⁰ Those seeking an exemption must show that the requirements of their faith prevent their fulfilling the legal obligation in question, and that they would be forced into a conflict of conscience if forced to do what the law requires.⁴⁸¹ The courts require a concrete, substantial, and "objectively demonstrable" presentation of the religious duty, which weeds out frivolous requests or those actually based on non-religious grounds.⁴⁸² The individual's interests are weighed against the interests of the state in enforcing the rule or law.⁴⁸³ Applying this test, the courts have required schools, for example, to exempt twelve and thirteen-year-old Muslim girls from co-ed physical education classes at the request of their parents, who claimed in part that the clothing worn by girls in the presence of boys violated their faith.⁴⁸⁴ The court rejected the school's emphasis

478. See William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 386-400 (1989); Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 GEO. WASH. L. REV. 685, 733-38 (1992).

479. See CURRIE, *supra* note 90, at 255-66 (reviewing a number of decisions by the Constitutional Court requiring exemptions from generally applicable laws). The courts have also refused to permit exemptions, including a number of claims by Muslims for exemptions from the law requiring anesthetization of animals before slaughter. State Court in Hamm, February 27, 1992, *reprinted in* 30 ENTSCHEIDUNGEN IN KIRCHENSACHEN (KirchE) 93 (1997); Administrative Court of Hamburg, September 9, 1989, *reprinted in* 27 KirchE 246 (1994). An administrative court in Bavaria rejected a mother's claim that her religion required exemption of her daughter from swimming lessons in the public schools. The school's interest took precedence, the court reasoned, because although the plaintiff referred to the Bible, she advanced only very general arguments that wearing bathing suits is "immoral" and "sinful." The court found these explanations not sufficiently objective or demonstrable. Administrative Court, of Bavaria, Apr. 8, 1992, *reprinted in* 30 KirchE 189 (1997).

480. Laws governing the slaughter of animals provide for religious exceptions, see § 4a Abs. 2 Nr. 2 TierSchG 1986, and prisons must make it possible for prisoners to follow the eating requirements of their faith. § 21 StVollzG.

481. Decision of the Federal Administrative Court, August 25, 1993, *reprinted in* 31 KirchE 328, 334 (1997).

482. *Id.*

483. *Id.*

484. The Federal Administrative Court granted relief to two different plaintiffs in very similar cases on August 25, 1993. *Id.* at 328, 341.

on the importance of physical education because the plaintiffs agreed to participate in single-sex physical education classes,⁴⁸⁵ and credited the plaintiffs' claims that less restrictive measures, such as wearing different clothing during the classes, would not resolve their conflict of conscience.⁴⁸⁶ The court also reasoned that to require participation in sports in clothing not well-suited for that purpose would put the students at a disadvantage.⁴⁸⁷

These cases suggest that the German courts seem generally open to the claims of minority religious adherents,⁴⁸⁸ perhaps answering in part the concern that courts will have troubling "seeing" burdens that are less familiar to them. The courts do not and cannot fully answer this concern, but *Smith*, which retreated to a bright-line rule to the substantial detriment of minority religious interests, suggests the dangers in over-emphasizing the courts' difficulties in evaluating claims of religious faith or obligation.

(c) Greater Access to Government Speech

Another way of evaluating whether government religious speech advances the religious beliefs of constituents is by considering the extent to which access to comparable speech is, or can be, extended to others. The dissent in the Classroom Crucifix Case made this point when it suggested that if a student sought comparable access to another religious symbol, the schools should honor that request (although the school could deny the request to restore the crucifix entirely). In the United States, both Professor McConnell and Justice Kennedy raise the issue of access, albeit in somewhat different ways. Professor McConnell suggests this access as a remedy for those who complain about government religious speech.⁴⁸⁹ Justice Kennedy

485. *Id.* at 335.

486. *Id.*

487. *Id.* at 337-38.

488. Nonetheless, the danger that minority religious adherents will have more difficulty establishing the sincerity of their views deserves consideration, as a series of cases concerning the apparel of teachers in public schools proves. A court in Munich upheld a school's requirement that a teacher stop wearing in class the colors that he claimed his religion requires: "sunrise red," or "red mixed with orange and violet." Decision of the Administrative Court for Munich, Sept. 9, 1985, *reprinted in* 5 NVWZ 405 (1986). The court's reasoning, in light of the case law above, can only be described as disingenuous: the government, the court insisted, must remain entirely neutral on the issue of religion, hence teachers cannot wear attire that "advertises" their religion. When the teacher pointed out that the schools were, by law, Christian in basis, suggesting that the government was not strictly neutral, the court responded that reliance on this argument was not available because the plaintiff was not Christian.

489. See McConnell, *Crossroads*, *supra* note 24, at 193.

would use access as way of evaluating whether the government intended to advance one religion over others; if this was the government's intent, his remedy would apparently be the traditional one advanced by the Supreme Court, removal of the symbol.⁴⁹⁰

This returns us to Professor Karst who argues that symbolic speech by the government has a particular capacity to polarize political debate because "[symbols] are not the subject of multilateral negotiation and they do not invite compromise."⁴⁹¹ Instead, "they present yes/no questions that offer no middle ground."⁴⁹² But some government speech *does* become open to compromise and middle ground. If difficulty in finding a middle ground is the key problem with government religious speech, there are more direct ways to address it than preventing such speech entirely.

As candidates for permissible government religious speech, Professor Karst suggests the phrase "under God" in the Pledge of Allegiance, and the phrase "In God we Trust" on money;⁴⁹³ both offer far less middle ground than the religious speech he so opposes, such as local display of religious holiday symbols. Perhaps the religious speech Karst would permit, like "In God we Trust," is less divisive or controversial than that which he argues against, like holiday displays. But ruling holiday displays flat-out unconstitutional seems to offer no cure for divisiveness, particularly if local government is free to keep putting up displays in the hope of coming within whatever rationale Karst would have us use to support the other, constitutional, religious speech, such as "In God We Trust." Beyond this, however, even putting an entire area beyond the reach of local politics offers no guarantee of political peace, as the school prayer cases well illustrate.⁴⁹⁴

The assumption that religious speech by the government is divisive not only tends to entail the premature assumption that the alternative is less divisive, it also ignores potentially better methods of reducing polarization along religious lines. An advantage of promoting comparable access to government speech

490. *County of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989).

491. Karst, *supra* note 76, at 508.

492. *Id.*

493. *Id.* at 520-21.

494. See SANDEL, *supra* note 48, at 64 (remarking that "[a] Court concerned above all to avoid social discord might reasonably have decided [the school prayer cases] the other way"). Others have thoroughly criticized divisiveness as a tool for the courts (a point which Karst partially accepts), see Edward M. Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L.J. 205 (1980), and the Court has largely abandoned this analysis, see, e.g., *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 339 n.17 (1987).

is that it tends to make the government speech itself less unique, less contested. If the response to a Christmas display is that other groups may use the same space for a Buddhist display, the government endorsement of the one display loses its uniqueness, and hence, perhaps, its divisiveness. It also forces religious majorities to consider their own reaction when symbols of other religions become part of government speech.

4. Non-Traditional Religious Majorities in Germany

One interesting potential advantage of the German approach is the possibility that it avoids an explicit bias toward historically powerful religions. It does include a bias toward religious views currently present in the community, and something of a bias toward the majority religion in a community. However, the religious group that this approach favors could vary from community to community, and the degree of the courts' oversight could partially reduce majority bias as a whole.

In Germany, however, non-traditional religious majorities are extremely unlikely to gain significant political power. Relatively few people from Turkey or the former Yugoslavia—the vast majority of Muslims, in other words—are German citizens, both because those born in Germany to foreign parents do not automatically acquire German citizenship, and because German law generally requires those who seek German citizenship to renounce their citizenship in other countries.⁴⁹⁵ Although citizens of European Community member states may vote in local elections, this does not include people from Turkey or the former Yugoslavia.⁴⁹⁶ Moreover, electoral control of the schools is at the *state*, not the local level. There are no local school boards, and local decisions are thus executive ones.⁴⁹⁷ This makes it unlikely that non-mainstream religious majorities, including Christian ones, will exercise significant control over the schools. Majorities with no religious affiliation are now the norm in the former East German states, but the secular speech in which those

495. BEAUFTRAGTE DER BUNDESREGIERUNG FÜR AUSLÄNDERFRAGEN, MIGRATION UND INTEGRATION IN ZAHLEN: EIN HANDBUCH [MIGRATION AND INTEGRATION IN NUMBERS: A HANDBOOK], 74-75 (1997).

496. The Basic Law provides in Article 20(2) that “[a]ll state authority shall emanate from the people,” which the Constitutional Court has interpreted to mean that the right to vote may not be extended to aliens. A constitutional amendment extends the limited voting rights to citizens of European Union states. CURRIE, *supra* note 90, at 105 n.12.

497. Interview with Walter Germun, Bavarian Ministry for Education, Culture, Science, and Art, in Munich (Mar. 13, 1998).

governments are likely to engage does not pose the same constitutional difficulties as religious speech.⁴⁹⁸

All in all, comparing Germany and the United States provides no answers to the problems of government religious speech. The favored position in the American commentary, prohibiting government religious speech altogether, has generally failed to deal squarely with the German objection that this approach requires the government to favor secularism over religious views, even when the institutions and wishes of the people lean heavily in the other direction. A focus on private religious choice cannot, moreover, be decoupled from a normative view about how the political system should work. Even if we agree that the goal for government religious speech is the recognition and promotion of individual autonomy, and that such speech should reflect the private institutions of the people, the catch is that we must reach this goal through the political process.

The German approach has a normative view of how the political process should work, and it leaves more to local outcome within that process. The attendant dangers include a potential bias toward majority religions, and judicial standards that perhaps seem less opaque and thus less legitimate. German reasoning could, on the other hand, encourage local decision-making and provide a consensus-based vision of how that process might operate. Yet, ironically, this approach would perhaps be more attractive in the United States, where local religious majorities are more varied and have more political power, particularly over the schools.⁴⁹⁹ In Germany, on the other hand, when I asked a member of the Bavarian Constitutional Court whether he would uphold a state law that provided for non-Christian symbols in the classroom just as the current law provides for crosses, his answer of "yes" seemed to come all too quickly.⁵⁰⁰ There is simply no danger that the state of Bavaria will provide for any religious symbols other than Christian ones in the schools.

498. In the dispute in Brandenburg around the LER classes, however, churches argue that the state's secular speech violates its obligation of neutrality by portraying religion in an unfairly poor light. *See supra* note 144.

499. *See* 68 AM. JUR. 2D *Schools* §§ 10, 53 (1993) (explaining that some school board elections are local).

500. Interview with Dr. Gustav Lichtenberger, Justice of the Bavarian Supreme Court, in Munich (Mar. 13, 1998).

VI. CONCLUSION

We will never face Germany's specific problems of religion and government, arising as they do from its particular history. The sharply contested religion cases from Germany in the late 1990s do, however, point to problems with our growing reliance on private religious choice analysis that demand our attention in both government funding and speech cases. To understand the problems of funding religious groups in neutral programs, we must back up and ask the foundational question: what goals may the government pursue with its funding? The broader those goals are defined, the greater the potential distortion of private religious choice, through either inclusion or exclusion from the programs. To fully make sense of government funding and the Establishment Clause, we must consider its role in protecting the power of public discourse within the larger political process.

The same holds for government religious speech: individual autonomy points in a number of different directions, leaving us with choices among different kinds of distortion and different roles for the courts, which we cannot resolve based on private religious choice alone. The German cases focus us on one normative vision of the political process which will probably never become our vision, but which does help us to see that even our decisions about government religious speech depend upon our assumptions and aspirations about the political process. The appeal of comparative law lies in the details, and the details of the current disputes in Germany around religion and government ask us to think again about exactly what we expect from the Establishment Clause here in America.*

* Special thanks to Michelle Ida Turner for her many translations that appear in the footnotes. Translations in the text, except of the Basic Law, are the Author's.

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